

No. 15276-77

United States
Court of Appeals
for the Ninth Circuit

CHICAGO, MILWAUKEE, ST. PAUL and PA-
CIFIC RAILROAD COMPANY, UNION
PACIFIC RAILROAD COMPANY, SOUTH-
ERN PACIFIC COMPANY, GREAT
NORTHERN RAILWAY COMPANY and
NORTHERN PACIFIC RAILWAY COM-
PANY,

Appellants,

vs.

ALOUETTE PEAT PRODUCTS, LTD., et al.,
Appellees.

INTERSTATE COMMERCE COMMISSION,
Appellant,

vs.

ALOUETTE PEAT PRODUCTS, LTD., et al.,
Appellees.

Transcript of Record

Appeals from the United States District Court for the
Western District of Washington
Northern Division

FILED

FEB 27 1957

PAUL P. O'BRIEN, CLERK



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Court of Appeals
for the Ninth Circuit

CHICAGO, MILWAUKEE, ST. PAUL and PA-
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PACIFIC RAILROAD COMPANY, SOUTH-
ERN PACIFIC COMPANY, GREAT
NORTHERN RAILWAY COMPANY and
NORTHERN PACIFIC RAILWAY COM-
PANY,

Appellants,

vs.

LOUETTE PEAT PRODUCTS, LTD., et al.,
Appellees.

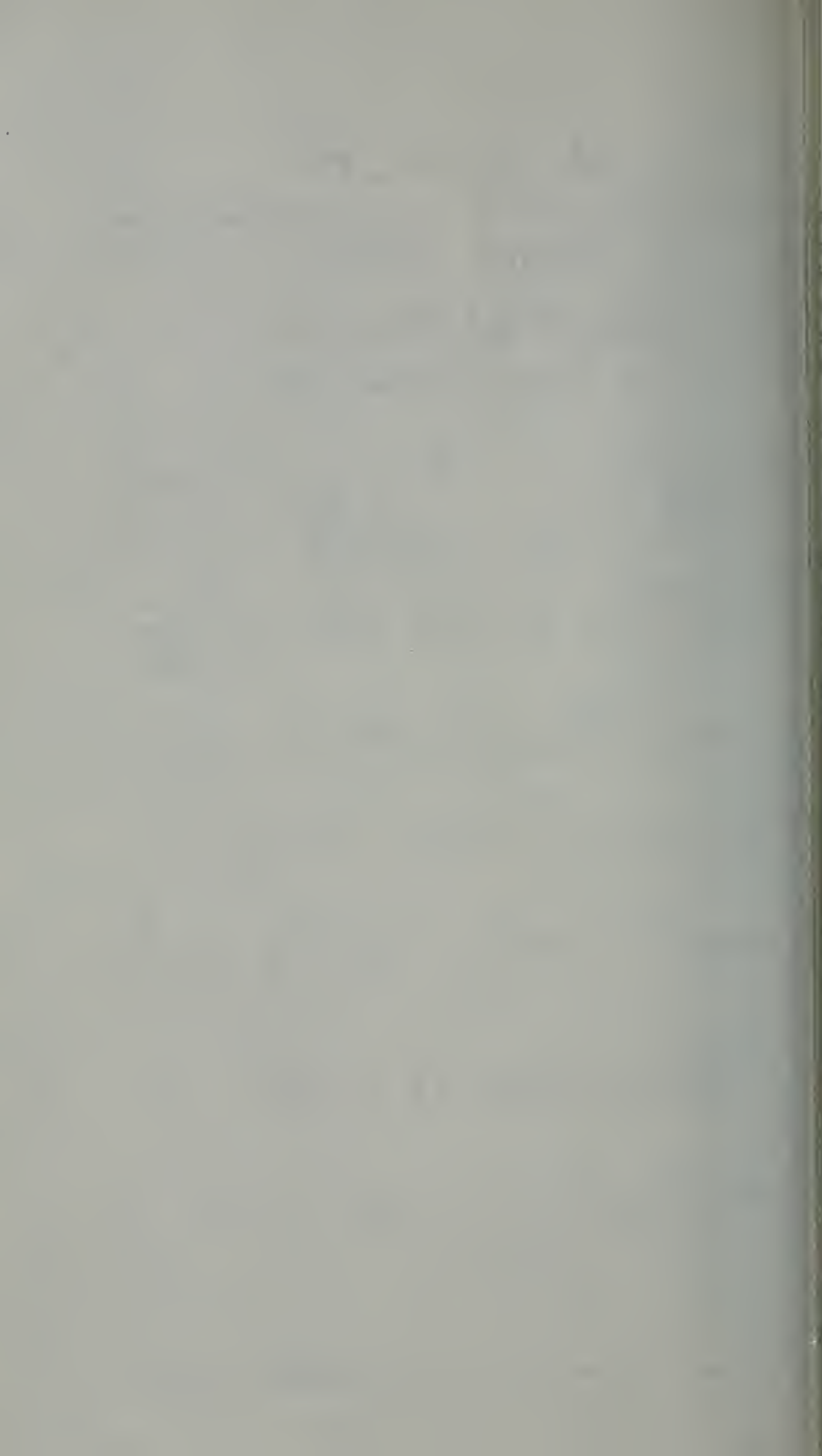
INTERSTATE COMMERCE COMMISSION,
Appellant,

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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In the District Court of the United States, Western District of Washington, Northern Division

No. 3923

ALOUETTE PEAT PRODUCTS, LTD.,
Plaintiff,

vs.

UNITED STATES OF AMERICA,
Defendant.

COMPLAINT

Comes now the plaintiff and alleges as follows:

I.

At all times mentioned herein plaintiff was and now is a corporation existing under the laws of the Dominion of Canada, and was and now is engaged in the marketing of peat, and had and has its mailing address and place of business at McTavish Road, Pitt Meadows, B. C.

II.

That this action is brought under the laws of the United States of America regulating Commerce, and particularly the Interstate Commerce Act, 49 U.S.C.A. Section 1 et seq. and 28 U.S.C.A. Section 1336. That this action is brought for the purpose of having this Court review the decision and Orders of the Interstate Commerce Commission set forth in Paragraph V below, and to set the said decisions and Orders aside.

III.

These proceedings originated in a complaint filed by the above named plaintiff with the Interstate Commerce Commission on May 31, 1949, under I.C.C. Docket No. 30260. That the said Complaint was filed against the following named common carriers:

The Atchison, Topeka and Santa Fe Railway Company,

Canadian Pacific Railway Company,

Chicago, Burlington & Quincy Railroad Company,

Chicago, Great Western Railway Company,

Chicago, Indianapolis and Louisville Railway Company,

Chicago and North Western Railway Company,

The Chicago, Rock Island and Pacific Railway Company,

The Chicago, Rock Island and Pacific Railway Company (Joseph B. Fleming and Aaron Colnon, Trustees),

Chicago, St. Paul, Minneapolis and Omaha Railway Company,

Great Northern Railway Company,

Minneapolis, Northfield and Southern Railway Company,

Minneapolis, St. Paul & Sault Ste. Marie Railway Company,

Missouri Pacific Railroad Company (Guy A. Thompson, Trustee),

Modesto and Empire Traction Company,

Northern Pacific Railroad Company,

Northwestern Pacific Railroad Company,

Pacific Electric Railway Company,
Petaluma and Santa Rosa Railroad Company,
Southern Pacific Company,
Union Pacific Railroad Company.

That the said Complaint, being I.C.C. Docket No. 30260, charged the defendants therein with assessing rates in violation of Sections 1, 3, and 6 of the Interstate Commerce Act, as amended. That the said Complaint prayed that the defendant carriers be ordered to refund overcharges to the complainant.

IV.

That a Stipulation was made and entered into between the parties to I.C.C. Docket No. 30260, that the Complaint be submitted to the Interstate Commerce Commission for decision and that the Interstate Commerce Commission may decide the issues defined by the pleadings on the record made in I.C.C. Docket No. 29974, Acme Peat Products, Ltd., et al., vs. The Akron, Canton and Youngstown Railway Company, et al. That the said Stipulation was dated August 17, 1949, and pursuant to such Stipulation the above named complaint was submitted on the record made in I.C.C. Docket No. 29974. That the Complaint in I.C.C. Docket No. 29974 was set for hearing by the Interstate Commerce Commission and notice of said hearing was given, and the said hearing was commenced at the City of Seattle, Washington, on the 10th day of November, 1948, before George J. Hall, one of the examiners of the said Interstate Commerce Commission. That plaintiffs therein appeared at said hearing by their

attorney. That witnesses were sworn and evidence taken and exhibits admitted at the said hearing, and the said hearing was concluded on November 10, 1948. That, thereafter, briefs were filed by complainants and defendants, and, thereafter, a proposed report was issued by examiners George J. Hall, and L. H. Dishman of the Interstate Commerce Commission. That the said proposed report found that complainants' Complaint before the Interstate Commerce Commission should be dismissed. That, thereafter, complainants filed Exceptions to the proposed report, and defendants filed their Reply to Exceptions of Complainants. That oral argument was had before the Interstate Commerce Commission at Washington, D. C. on November 17, 1949.

That pursuant to the aforesaid record made in I.C.C. Docket No. 29974, the Interstate Commerce Commission, on April 7, 1950, entered its Findings and Conclusions and Order in I.C.C. Docket No. 30260, said Order awarding reparations to complainant and granting relief to complainant as prayed for in its Complaint filed with the Interstate Commerce Commission. That a true copy of the said Findings and Conclusions and Order of April 7, 1950, is attached hereto as Exhibit A and is hereby made a part hereof as if set forth at length herein.

That, thereafter, and in accordance with the Rules of the Interstate Commerce Commission, defendants filed their Petition for Reconsideration by the Entire Commission and for Argument, and

omplainant filed its Reply thereto. That on the
th day of January, 1952, the Interstate Commerce
ommission issued its decision and Order denying
efendants' Petition for Reconsideration by the
ntire Commission and for Oral Argument. That
true copy of the said Order of January 7, 1952,
attached hereto as Exhibit B and is hereby made
part hereof as if set forth at length herein.

That, thereafter, and on the 30th day of Decem-
er, 1953, the Interstate Commerce Commission is-
ued its Supplemental Order ordering defendant
arriers listed in said Order to pay unto the Com-
plainant, on or before February 19, 1954, the
amounts set opposite their respective names in the
foresaid Order of December 30, 1953. That a true
copy of the said Order of December 30, 1953, is
attached hereto as Exhibit C and is hereby made
part hereof as if set forth at length herein.

V.

That, thereafter, defendants in I.C.C. Docket No.
0260 filed with the Interstate Commerce Commis-
sion a Petition For Leave to File Petition to Re-
open and Reconsider, and their Petition To Reopen
for Reconsideration, said Petitions being dated
April 16, 1954. That on June 21, 1954, the Inter-
state Commerce Commission issued its Order grant-
ing the defendants' Petition For Leave To File,
and the Commission reopened the said proceedings
for reconsideration. That a true copy of the said
Order of June 21, 1954, is attached hereto as Ex-
hibit D and hereby is made a part hereof as if

set forth at length herein. That complainant's request for oral argument upon defendants' Petition To Reopen For Reconsideration was denied. That on October 4, 1954, the Interstate Commerce Commission issued its Findings and Conclusions and Order denying relief to complainant and dismissing complainant's Complaint. That a true copy of said Findings and Conclusions and Order of October 4, 1954, is attached hereto as Exhibit E and is hereby made a part hereof as if set forth at length herein. That, thereafter, complainant filed its Petition for Reconsideration of the Commission's decision dated October 4, 1954, and the defendants replied to the said Petition. That on January 3, 1955, the Interstate Commerce Commission issued its Order denying plaintiff's Petition For Reconsideration. That a true copy of said Order of January 3, 1955, is attached hereto as Exhibit F and is hereby made a part hereof as if set forth at length herein.

VI.

That the Interstate Commerce Commission erred in making and entering its Order of June 21, 1954, granting defendants' Petition For Leave To File Petition To Reopen and Reconsider, and the Interstate Commerce Commission erred in reopening the said proceedings and in entertaining the defendants' Petition To Reopen For Reconsideration. That the Commission was without authority of law and was without jurisdiction in entering the order of June 21, 1954, as follows:

1. That the said Commission had no authority to reconsider its Final Order;
2. That the reconsideration was contrary to the established rules of procedure of the said Commission;
3. That some or all of defendant carriers were in default at the time the said Order of June 21, 1954 was granted;
4. That the reconsideration by the Commission denied to plaintiff due process of the law.

VII.

That the Findings and Conclusions and Order entered by the Interstate Commerce Commission on October 4, 1954, and the Order of January 3, 1955, denying a reconsideration to plaintiff, were and are, and each of them is unlawful and based on a misapplication of law and were and are otherwise arbitrary, capricious, and without support in and contrary to the law and the evidence, and that the Conclusions in the Order of October 4, 1954, were and are not supported by the Findings, and that the Findings in the said Order of October 4, 1954 were and are not supported by any substantial evidence whatsoever. Plaintiff more specifically shows for grounds of review as follows:

1. There is no evidence, or no substantial evidence, in the record to support the Finding of Fact of the Commission as set forth on Sheet 6, last full paragraph, and paragraph on bottom of Sheet 6 and top of Sheet 7 that there is no evidence of

unreasonableness in the assailed rates. That the Commission erred in failing to find that the assailed rates were unreasonable.

2. There is no evidence, or no substantial evidence, in the record to support the Finding of Fact of the Commission as set forth on Sheet 2, last paragraph, and in the paragraph on the bottom of Sheet 6, and the top of Sheet 7 that there is no showing of undue prejudice. That the Commission erred in failing to find that the actions of the defendant carriers, in publishing rates contravening an Order of the Commission and/or publication of said rates on short notice without authority created undue prejudice to the Complainant.

3. That the conclusion of the Commission, as set forth on Sheet 2, first full paragraph, and paragraph at the bottom of Sheet 6, and the top of Sheet 7 that the assailed rates are applicable is contrary to law and the whole of the evidence.

4. That the conclusion of the Commission, as set forth on Sheet 3, first full paragraph, that improper tariff publication does not give rise to unreasonableness is contrary to law and the whole of the evidence, and denies to this plaintiff due process of the law.

5. That the conclusion of the Commission as set forth on Sheet 3, first full paragraph, and Sheet 2, first full paragraph, that reparations are not allowable for improper tariff publication, is contrary to law and the whole thereof of the evidence, and denies plaintiff herein the due process of law.

6. The Commission erred in failing to find that publication of rates by defendant carriers, without proper statutory notice, makes the rates inapplicable to plaintiff.

7. The Commission erred in concluding as a matter of law that complainant's Complaint be dismissed upon the ground that the Commission made no finding that the assailed rates were reasonable and the said Order of October 4, 1954, is not supported by any Finding of Fact that the rates assailed were reasonable.

8. That the Commission erred in failing to give due and proper consideration to the Findings and Conclusions and Final Order entered by the Commission on April 7, 1950, and erred in reversing said Findings and Conclusions and Order of April 7, 1950, in that the said Findings, Conclusions and Order of April 7, 1950, were each and all supported by substantial evidence and in accordance with the law.

9. That the Commission erred in entering its Order of October 4, 1954, and the whole thereof herein, upon the ground that said Order, and the whole thereof, is unsupported by Conclusions of Law, and Findings of Fact supported by substantial evidence upon the record considered as a whole, and is contrary to law.

Wherefore, plaintiff prays this Honorable Court as follows:

1. That this Court take jurisdiction of the proceedings, and of the questions determined therein,

and that this Court review all of the said records and proceedings had by the Interstate Commerce Commission in this matter, including the record had and made in I.C.C. Docket No. 29974, said record and proceeding being made a part of this record by stipulation of the parties; that the Court make and enter its Order and Decree that the said Orders of June 21, 1954, October 4, 1954, and January 3, 1955, made by the said Interstate Commerce Commission, be annulled, vacated, and set aside; that this Court make and enter its Decision and Order awarding reparation to plaintiff of all sums charged by the common carriers listed in Paragraph III herein, in excess of the rates legally chargeable by said carriers, and make and enter herein Findings of Fact, and Conclusions of Law, and Decision consistent and in accordance with the evidence and the law in this cause; that the Court further make such decision and Order as shall be appropriate in the premises.

2. That this Court make and enter its Order directed to the Interstate Commerce Commission requiring the said Interstate Commerce Commission to certify fully to this Honorable Court, at a specified time and place, all of the records and proceedings of the said Interstate Commerce Commission in the said ICC Docket No. 30260, and also the record made in I.C.C. Docket No. 29974, made a part of the record of ICC Docket No. 30260 by due stipulation of the parties thereto, including all Orders and decisions therein, the transcript of all testimony, together with all the exhibits or copies

hereof introduced, and the written briefs filed by the parties herein, and the transcript of oral argument had before the said Commission, and the pleadings, and all files, filings, correspondence, records and proceedings in the said cause, to the end that they may be made a part of the record before the said acts of the Commission.

This Court, so that this Court may review the law.

3. Plaintiff further prays for its costs and disbursements herein.

WRIGHT, BOOTH & BERESFORD

/s/ ROBERT O. BERESFORD and

/s/ By JOANN R. LOCKE,

Attorneys for Plaintiff

[Endorsed]: Filed April 15, 1955.

Title of District Court and Cause No. 3923.]

MOTION FOR LEAVE TO INTERVENE

Come Now the Union Pacific Railroad Company, Southern Pacific Company, Great Northern Railway Company and Northern Pacific Railway Company, and pursuant to Title 28, Section 2323, petition the Court for an order granting leave to the above named petitioners to intervene herein as defendants, and in support thereof show the Court as follows:

I.

That each of the above named petitioners operates a line of railroad as a common carrier in inter-

state commerce and as such is subject to regulation by the Interstate Commerce Commission under Part I of the Interstate Commerce Act.

II.

That each of the above named petitioners were parties defendant in the cause No. 30260 entitled *Alouette Peat Products, Ltd., vs. The Atchison, Topeka and Santa Fe Railway Company, et al.*, lately pending before the Interstate Commerce Commission.

III.

That the purpose of this action is to have this Court annul, vacate and set aside the final order of the Interstate Commerce Commission entered in said Cause No. 30260 dismissing plaintiff's complaint against your petitioners, and therefore your petitioners have a direct and substantial interest in this proceeding.

/s/ HAROLD G. BOGGS

/s/ ROBERT F. GARING

/s/ R. PAUL TJOSSEM

Attorneys for Petitioners

Acknowledgment of Service attached.

[Endorsed]: Filed April 29, 1955.

[Title of District Court and Cause No. 3923.]

ORDER GRANTING LEAVE TO INTERVENE

This cause coming on to be heard on the 29th day of April, 1955 on the petition of Union Pa-

cific Railroad Company, Southern Pacific Company, Great Northern Railway Company and Northern Pacific Railway Company, for leave to intervene in the above entitled suit and to be made party defendants thereto, and the petition having been duly considered, and it appearing to the Court that the above named petitioners have an interest in the above entitled suit sufficient to warrant each of them becoming a party to this suit, it is therefore,

Ordered, Adjudged and Decreed that the Union Pacific Railroad Company, Southern Pacific Company, Great Northern Railway Company and Northern Pacific Railway Company be, and each of them hereby is granted leave to intervene in said suit as a party defendant.

Dated this 29th day of April, 1955.

/s/ GEO. H. BOLDT,

United States District Judge

Presented by:

/s/ R. PAUL TJOSSEM

Of Attorneys for Petitioners

Acknowledgment of Service Attached.

[Endorsed]: Filed April 29, 1955.

In the District Court of the United States, Western District of Washington, Northern Division

No. 3923

ALOUETTE PEAT PRODUCTS, LTD.,
Plaintiff,

vs.

UNITED STATES OF AMERICA,
Defendant,
and

UNION PACIFIC RAILROAD COMPANY, a
corporation, SOUTHERN PACIFIC COMPANY, a corporation, GREAT NORTHERN RAILWAY COMPANY, a corporation, and NORTHERN PACIFIC RAILWAY COMPANY, a corporation,
Intervening Defendants.

ANSWER OF INTERVENING DEFENDANT
RAILROADS

Come now the Union Pacific Railroad Company, Southern Pacific Company, Great Northern Railway Company and Northern Pacific Railway Company, intervening defendants, and answer the complaint of the plaintiff herein as follows:

I.

Admit the allegations in paragraphs I and II of said complaint.

II.

Admit the allegations of paragraph III of said

complaint, and allege that these defendants in publishing and charging the rates therein described did not and have not violated any provision of the Interstate Commerce Act, 49 U.S.C.A. Sections 1, 3, and 6, as amended, or any order of the Interstate Commerce Commission entered pursuant hereto.

III.

Admit the allegations in paragraphs IV and V of plaintiff's complaint.

IV.

Deny each and every allegation contained in paragraphs VI and VII of plaintiff's complaint.

Wherefore, having fully answered the complaint of the plaintiff herein, these intervening defendants pray that judgment be entered affirming the orders of the Commission entered in said cause, I.C.C. Docket No. 30260, dated October 4, 1954 and January 3, 1955; that the plaintiff take nothing by its complaint in this cause; that the same be dismissed; and that these intervening defendants be awarded their costs and disbursements incurred in defending this cause; and that the Court grant such other and further relief as in the premises appears equitable and just.

/s/ HAROLD G. BOGGS

/s/ ROBERT F. GARING

/s/ R. PAUL TJOSSEM

Attorneys for Intervening

Defendant Railroads

Acknowledgment of Service attached.

[Endorsed]: Filed June 2, 1955.

[Title of District Court and Cause No. 3923.]

ANSWER OF THE UNITED STATES OF
AMERICA

Now comes the United States of America, as defendant herein, and in answer to the Complaint says:

I.

This is a Complaint seeking to set aside an order of the Interstate Commerce Commission. The Interstate Commerce Act contains provisions adequate for the protection of the Commission's orders at the hands of the Commission and of the railroads, when as here, they are the real parties in interest [28 U.S.C.A. Sec. 2323].

II.

The Commission's order challenged herein involves the same parties, the same disputes, and the same claims for money damages as were involved in the proceedings before the Commission. The interested governmental agency, i.e., the Interstate Commerce Commission, will avail itself of the statutory authorization to interpose all defenses to the shipper's charges and claims possible of being interposed. Thus the Commission, and the railroads, if they so elect, will have an opportunity to present their respective positions through their own counsel. Under these circumstances, and in view of these facts, the United States does not oppose the Commission's order, but does not participate in its defense.

III.

Accordingly, the United States neither admits nor denies any of the allegations of the Complaint.

STANLEY N. BARNES,

Assistant Attorney General

CHARLES P. MORIARTY,

United States Attorney

/s/ F. N. CUSHMAN,

Assistant U. S. Attorney

/s/ JAMES E. KILDAY,

/s/ JOHN H. D. WIGGER,

Special Assistants to the

Attorney General

Attorneys for the United States
of America

Certificate of Service attached.

[Endorsed]: Filed June 15, 1955.

[Title of District Court and Cause No. 3923.]

INTERVENTION AND ANSWER OF INTER-
STATE COMMERCE COMMISSION

Comes now the Interstate Commerce Commission and pursuant to the provisions of U. S. Code, Section 2323 (28 U.S.C. 2323), hereby intervenes as of right as a party defendant in the above-entitled cause, enters the appearance of its counsel therein, and for answer to plaintiff's complaint, says:

First Defense

This Court lacks venue to entertain this suit be-

cause Title 28 U. S. Code, Section 1398, specifically provides that "any civil action to enforce, suspend or set aside in whole or in part an order of the Interstate Commerce Commission shall be brought only in the judicial district wherein is the residence or principal office of any of the parties bringing such action", and nowhere in the complaint is it alleged that plaintiff has its residence or principal office within the judicial district in which this suit is brought. On the contrary it is alleged in the first paragraph of the complaint herein that plaintiff is a Canadian corporation engaged in the marketing of peat, with address in the city in British Columbia, Canada, referred to in paragraph I of said complaint; therefore, plaintiff is without standing to maintain this suit.

Second Defense

Without waiving its foregoing defense, and further answering the plaintiff's complaint herein, the Commission answers and says:

I.

Answering the allegations of paragraphs I, II and III of the plaintiff's complaint herein, the Commission admits the same.

II.

Answering the allegations of paragraph IV of the plaintiff's complaint, the Commission admits that the stipulation was entered into between the parties to Docket I.C.C. No. 30260 as alleged in said paragraph and that hearings were held before

its examiner as alleged and that a proposed report was issued containing a recommendation that plaintiff's complaint should be dismissed. It is also admitted that following the filing of exceptions to the proposed report and replies to exceptions that oral argument was had before the Commission as alleged. It is further admitted that on April 7, 1950, Division 2 of the Commission served its report and order finding that the assailed rates were applicable but were unjust and unreasonable and concluded that plaintiff was entitled to an award of reparations based upon the findings contained in its said report (277 I.C.C. 641), to which the Court is referred for a full, true and accurate statement of such findings and conclusions. The remaining allegations of said paragraph are admitted.

III.

Answering the allegations of paragraph V of plaintiff's complaint herein, the Commission admits that on June 21, 1954, pursuant to petitions for reopening and reconsideration filed by the railroads, that said proceedings were reopened for reconsideration as alleged and that plaintiff's request for oral argument was denied. It is further admitted that on October 4, 1954, the entire Commission by its report on reconsideration denied the relief sought in plaintiff's complaint, as alleged in said paragraph, and that plaintiff's petition for reconsideration of said order of October 4, 1954, was denied by the Commission on January 3, 1955.

IV.

Answering the allegations of paragraph VI of the plaintiff's complaint herein, the Commission denies that it erred in making and entering its order of June 21, 1954, or that it acted beyond the scope of its authority and jurisdiction for any of the reasons alleged in said paragraph or for any other reason or reasons.

V.

Answering the allegations of paragraph VII of plaintiff's complaint, the Commission denies that the orders referred to therein are unlawful and are based on misapplication of law and are arbitrary and capricious and without support in the law, and denies that its said order of October 4, 1954, is not supported by adequate findings and conclusions and substantial evidence and further denies that its said order is invalid for any of the reasons stated in said paragraph or for any other reason or reasons.

Answering paragraph 2 of plaintiff's prayer (complaint pages 10-11), the Commission avers that there is no statutory requirement that the Court issue an order directing the Commission to prepare and certify the records and proceedings had before it in Docket I.C.C. No. 30260 as part of the record to be presented to this Court for its review of the actions of the Commission in this cause. In this connection the Commission avers that it is the duty and obligation of plaintiff to obtain the

record from the Commission (Wilson v. United States, 114 F. Supp. 814, 821; Mississippi Valley Barge Co. v. United States, 292 U. S. 282, 286-287) for introduction in Court, and the Commission also avers that upon request of plaintiff and the payment by it of a nominal fee to cover the cost of preparation, a certified copy of the record may be obtained from the Secretary of the Commission for that purpose. (Section 1006(d), Title 5 U.S.C.)

Except as herein expressly admitted, the Commission denies the truth of each of and all the allegations contained in the complaint, insofar as they conflict with the allegations herein.

All of which matters and things the Commission is ready to aver, maintain and prove as this Honorable Court shall direct and hereby prays that said complaint be dismissed.

INTERSTATE COMMERCE
COMMISSION,

/s/ By SAMUEL R. HOWELL,
Associate General Counsel

Certificate of Service attached.

[Endorsed]: Filed June 16, 1955.

In the District Court of the United States, Western District of Washington, Northern Division

No. 3924

ACME PEAT PRODUCTS, LTD.,
ALOUETTE PEAT PRODUCTS, LTD.,
ATKINS & DURBROW, LTD.,
BLUNDELL PEAT CO.,
BYRNE ROAD PEAT FARMS,
COAST PEAT CO., LTD.,
EXCELSIOR PEAT CO., LTD.,
LULU ISLAND PEAT CO., LTD.,
NORTHERN PEAT MOSS CO., LTD.,
PACIFIC PEAT PRODUCTS, LTD.,
RICHMOND-PEAT PRODUCTS, LTD.,
SHAFFER-HAGGART, LTD.,
WESTERN PEAT CO., LTD.,

VS.

UNITED STATES OF AMERICA,
Defendant.

No. 3923

ALOUETTE PEAT PRODUCTS, LTD.,
Plaintiff,

VS.

UNITED STATES OF AMERICA,
Defendant.

STIPULATION FOR CONSOLIDATION

It is hereby stipulated and agreed to by and between plaintiffs in the two above entitled actions,

acting by and through their attorneys, Wright, Booth & Beresford; and the defendant, United States of America, in the above entitled actions; and the intervenors, Chicago, Milwaukee, St. Paul and Pacific Railroad Company, Union Pacific Railroad Company, Southern Pacific Company, Great Northern Railway Company, and Northern Pacific Railway Company, acting by and through Harold G. Boggs, Robert F. Garing, and R. Paul Tjossem, their attorneys; and intervenor, Interstate Commerce Commission, acting by and through Samuel R. Howell, Associate General Counsel, its attorney; that the two above entitled causes be consolidated into one action in this Court, for the reason that the said actions contain common questions of law and fact and for the reason that the above numbered action, No. 3923, was heard below before the Interstate Commerce Commission upon the record made in the above numbered action, No. 3924.

Dated at Seattle, Washington, this 24th day of June, 1955.

/s/ JOANN R. LOCKE,

Of Wright, Booth & Beresford,

Attorneys for Plaintiffs, Acme Peat Products, Ltd., et al., and Alouette Peat Products, Ltd.

UNITED STATES DISTRICT
ATTORNEY,

/s/ By F. N. CUSHMAN,

Assistant U. S. Attorney

INTERSTATE COMMERCE
COMMISSION,

/s/ By SAMUEL R. HOWELL,
Associate General Counsel

/s/ R. PAUL TJOSSEM,

Of Attorneys for Intervenors, Chicago, Milwaukee,
St. Paul and Pacific Railroad Company; Union
Pacific Railroad Company; Southern Pacific
Company; Great Northern Railway Company;
Northern Pacific Railway

[Endorsed]: Filed July 29, 1955.

[Title of District Court and Causes 3923 and 3924.]

ORDER CONSOLIDATING ACTIONS

This matter having come on regularly for hearing on this day and date before the undersigned, one of the judges of the above captioned court, upon the Stipulation of the parties to the above entitled action for consolidation of the said action, and it appearing to the Court that the said actions involve common questions of law and fact and that the action above numbered 3923 was heard before the Interstate Commerce Commission upon the record made in the action above numbered 3924, and it appearing that it is to the interest of all parties that said actions should be consolidated and good cause appearing therefor,

It Is Hereby Ordered, Adjudged and Decreed that the above captioned causes of action be and

they are hereby consolidated into one action in this Court.

Done in Open Court this 29th day of July, 1955.

/s/ GEO. H. BOLDT,
United States District Judge

Presented by:

/s/ JOANN R. LOCKE,
Of Wright, Booth & Beresford,
Attorneys for Acme Peat Products, Ltd., et al., and
Alouette Peat Products, Ltd.

Approved by:

UNITED STATES DISTRICT
ATTORNEY,

/s/ By F. N. CUSHMAN,
Assistant U. S. Attorney

Approved by:

/s/ R. PAUL TJOSSEM,
Of Attorneys for Intervenors, Chicago, Milwaukee,
St. Paul and Pacific Railroad Company; Union
Pacific Railroad Company; Southern Pacific
Company; Great Northern Railway Company;
Northern Pacific Railway

INTERSTATE COMMERCE
COMMISSION,

/s/ By SAMUEL R. HOWELL,
Associate General Counsel

[Endorsed]: Filed July 29, 1955.

[Title of District Court and Causes 3923 and 3924.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter having come on duly and regularly for trial on the 12th day of June, 1956, before the undersigned Judge of the above-entitled court; and said causes above having been consolidated by order of Court duly made and entered on the 29th day of July, 1955 pursuant to stipulation between all parties; and the plaintiffs in both causes being represented in court by their attorneys, Robert O. Beresford and JoAnn R. Locke of the firm of Wright, Booth & Beresford, and Fred H. Tolan; and the defendant United States of America being represented in court by John A. Roberts, Jr., Assistant United States Attorney; and the intervening Defendant, the Interstate Commerce Commission, being represented in court by John A. Roberts, Jr.; and the intervenor railroads, Chicago, Milwaukee, St. Paul and Pacific Railroad Company; Union Pacific Railroad Company; Southern Pacific Company; Great Northern Railway Company; and Northern Pacific Railway, being represented in court by and through their attorney, R. Paul Tjossem, and the defendant, United States of America, having, by its answer filed herein, taken a neutral position in this action, and the intervening defendant, the Interstate Commerce Commission having submitted their case on written brief and having, through their attorney, John A. Roberts, Jr., tendered in open court oral argument of

the above-captioned actions to the intervenor railroads, acting by and through their attorney, R. Paul Tjossem; and the transcript of all of the proceedings before the Interstate Commerce Commission having been filed in the above-captioned proceedings and having been produced by the plaintiffs, being duly and regularly introduced as exhibits in the above-captioned causes; and no further testimony having been taken or evidence introduced by any party to the action; and the Court having heard oral argument, and being familiar with the records and files herein, and having heretofore announced its oral decision, herewith makes the following

Findings of Fact

I.

That the Court has jurisdiction over the subject matter of this action and the parties hereto under and by virtue of the laws of the United States of America regulating commerce, and in particular the Interstate Commerce Act, 49 U.S.C.A. Section , et seq., and 28 U.S.C.A. Section 1336.

II.

That this action is brought for the purpose of having this Court review the decision and orders of the Interstate Commerce Commission, as more particularly hereinafter set forth.

III.

That the defendant, the United States of America, and the intervening defendant, the Interstate

Commerce Commission, have, in open court, waived any issue with regard to the venue as presented by these cases. That no issue of venue was raised on behalf of the intervenor railroads by their Answer in this case.

IV.

That at all times herein mentioned the plaintiffs were, and now are, corporations existing under the laws of the Dominion of Canada, and were, and now are, engaged, among other things, in the marketing of peat, with principal places of business as hereinafter set forth:

Acme Peat Products, Ltd., 789 West Pender St., Vancouver, B. C.

Alouette Peat Products, Ltd., McTavish Road, Pitt Meadows, B. C.

Atkins & Durbrow, Ltd., Royal Bank Bldg., Vancouver, B. C.

Blundell Peat Co., 806 #6 Road, R.R. #2, Vancouver, B. C.

Byrne Road Peat Farms, 2707 McKay Avenue, Burnaby, B. C.

Coast Peat Co., Ltd., 1115 Vancouver Block, Vancouver, B. C.

Excelsior Peat Co., Ltd., 7675 Osler Avenue, Vancouver, B. C.

Lulu Island Peat Co., Ltd., R.R. #2, Eburne, B. C.

Northern Peat Moss Co., Ltd., No. 8 Rd. R.R. #2, Eburne, B. C.

Pacific Peat Products, Ltd., 1137 West Hastings St., Vancouver, B. C.

Richmond Peat Products, Ltd., 1137 West Hastings St., Vancouver, B. C.

Shafer-Haggart, Ltd., Vancouver, B. C.

Western Peat Co., Ltd., P. O. Box 699, New Westminster, B. C.

V.

That hitherto, to wit, on the 5th day of December, 1946, in proceedings denominated as Ex Parte 162, which is more particularly set forth in 266 I.C.C. 537, the Interstate Commerce Commission did make and enter an order allowing certain increases in freight rates and, in particular, in the Conclusion, Appendix 1—Sheet 1, as follows:

“Basic freight rates, whether class or commodity, and charges, on the commodities hereinafter specified, may be increased in the amounts and in the manner set forth as to each commodity class or group. The commodity group numbers (or commodity class numbers) used in this appendix, and throughout the entire report and order, for convenience, are those specified in the order of Division Four of November 22, 1927, In the Matter of Freight Commodity Statistics, which was in effect at the date of submission herein, although a new list of commodity classes with articles assigned thereto has been promulgated by order of Division One, September 24 and October 16, 1946, to become effective January 1, 1947. They are intended generally to cover the items customarily included by the carriers in their reports to the Commission under each numbered description, as of the date for the submission.”

That the same decision set forth in Appendix 1—Sheet 7 the following allowed increases:

“Fertilizers, n.o.s., Including Potash—Group 640

“Diatomaceous or Infusorial Earth—Group 701

“Twenty percent, subject to a maximum of 6 cents per 100 pounds, or \$1.20 per net ton.”

That Commodity Group No. 640 of the Freight Commodity Statistics, referred to by the Commission, included peat, ground or unground, as a fertilizer. That accordingly, pursuant to said decision, the Interstate Commerce Commission did authorize a 20% increase in freight rates for the shipment of peat, subject, however, to a maximum of 6 cents per 100 lbs., or \$1.20 per ton, and subject to the condition that the authorized increases be given specified publication of such authorized increases which was not done.

VI.

The carriers involved in this case in publishing their rates published a 6 cent maximum increase in rates on peat only when that commodity was carried in tariffs under fertilizer groups. In instances where a special commodity rate was published for peat, the full 20% increase was published and exacted. The rates applying on peat from points in British Columbia to destinations in the United States were special commodity rates. That such 20% increase and such commodity rates were not authorized. That accordingly from January 1, 1947 until January 1, 1948, shipments of peat or peat products originating from points in British Columbia were unlawfully made subject to the full 20% in-

crease. That the publication of the tariffs in this paragraph referred to were improperly made on a 5-day shortened period of publication in violation of Ex Parte 162, which order permitted only authorized increases to be made on said 5-day notice. That on March 29, 1948, the carriers amended their master tariff to show the 6 cent maximum increase authorized on peat. Prior to said time, the carriers unlawfully republished rates on peat originating in British Columbia to points in northern California by taking the full 20% increase.

VII.

That the increase in rates damaged the plaintiffs in this case by causing a loss of market.

VIII.

That the parties plaintiff did file two Complaints before the Interstate Commerce Commission praying for reparations for the overcharges exacted and for a reduction of the rates imposed by the carriers for shipments of peat into northern California. That, acting upon said Complaints, the Interstate Commerce Commission did, on April 7, 1950, make and enter its Findings, Conclusions and Order awarding reparations to the complainants herein, and further ordering the unauthorized increase exacted on shipments of peat to northern California to be removed. That defendant carriers' petition for reconsideration was denied by Order made and entered by the Interstate Commerce Commission on January 7, 1952. That on December 30,

1953, the Interstate Commerce Commission did make and enter its supplemental Order listing the exact amounts to be paid to each plaintiff by each defendant carrier, together with interest thereon. That said defendant carriers were ordered and directed to make said reparation payments to the plaintiffs on or before February, 1954.

IX.

On March 8, 1954, the defendant carriers petitioned the Interstate Commerce Commission for leave to reopen and reconsider, which petition was granted by Order entered the 21st day of June, 1954. That on October 4, 1954, the Interstate Commerce Commission issued its Findings, Conclusions and Order denying relief to the plaintiffs herein, and dismissing their Complaints. That thereafter plaintiffs petitioned for reconsideration of the aforesaid Order of October 4, 1954. That on January 3, 1955, the Interstate Commerce Commission issued its Order denying plaintiffs' petition for reconsideration.

From the foregoing Findings of Fact, the Court makes the following

Conclusions of Law

I.

That it has jurisdiction over the subject matter and parties hereto.

II.

That the action of the defendant carriers in publishing tariffs on shortened notice, not authorized

y Ex Parte 162 referred to in the Findings herein, was illegal and void. That accordingly the defendant carriers were not entitled either to exact the 0% increase or the 6 cent maximum permitted under Ex Parte 162. That the rates which were in effect immediately before the initiation of the proceedings by the defendant railroads for the purpose of obtaining an increase in the rates were the legal rates applicable to these shipments here in question at the time they were made, and that all rates applied to plaintiffs' shipments and all sums of money exacted from plaintiffs by applying such freight rates to the extent of the excess of such rates over said prior existing approved rates are and were illegal and void and without legal right, since said rates were not authorized by law nor promulgated in the manner provided by law nor in the manner specifically and expressly conditioned by the Interstate Commerce Commission.

III.

That where shipments of peat, as herein complained of, have been carried over a route involving more than one carrier, said carriers are jointly and severally liable for the refund of the excess charges thus illegally exacted.

IV.

That the Interstate Commerce Commission violated its own rules and as a result thereof denied the plaintiffs due process by granting a second petition of the railroads for reconsideration as more particularly set forth in its Order of June 21, 1954.

V.

That the plaintiffs are entitled to judgment against the defendants, and each of them directing that the orders heretofore made by the Interstate Commerce Commission be reversed, and that these causes above-captioned be remanded to the Interstate Commerce Commission for the fixing of the amount of reparations due the plaintiffs, together with interest thereon, and the entry of a reparations order consistent with the findings of fact, conclusions of law and judgment herein entered.

Done in Open Court this 19th day of June, 1956.

/s/ JOHN C. BOWEN,
United States District Judge

Presented by:

/s/ ROBERT O. BERESFORD,
Of Wright, Booth & Beresford,
Attorneys for Acme Peat Products,
Ltd., et al., and Alouette Peat
Products, Ltd.

[Endorsed]: Filed June 19, 1956.

In the District Court of the United States, West-
ern District of Washington, Northern Division
Consolidated Actions

No. 3923

ALOUETTE PEAT PRODUCTS, LTD.,
Plaintiff,

vs.

UNITED STATES, et al., Defendants.

No. 3924

ACME PEAT PRODUCTS, LTD., et al.,
Plaintiffs,

vs.

UNITED STATES et al., Defendants.

JUDGMENT

This matter having come on duly and regularly
for trial on the 12th day of June, 1956, before the
undersigned Judge of the above-entitled court; and
said causes above having been consolidated by order
of Court duly made and entered on the 29th day of
July, 1955, pursuant to stipulation between all
parties; and the plaintiffs in both causes being
represented in court by their attorneys, Robert O.
Beresford and JoAnn R. Locke of the firm of
Wright, Booth & Beresford, and Fred H. Tolan;
and the defendant, United States of America, being
represented in court by John A. Roberts, Jr., As-

sistant United States Attorney; and the Intervening Defendant, the Interstate Commerce Commission, being represented in court by John A. Roberts, Jr.; and the intervenor railroads, Chicago, Milwaukee, St. Paul and Pacific Railroad Company; Union Pacific Railroad Company; Southern Pacific Company; Great Northern Railway Company; and Northern Pacific Railway, being represented in court by and through their attorney, R. Paul Tjossem; and the defendant, United States of America, having taken a neutral position in this action, and the intervening defendant, the Interstate Commerce Commission having submitted their case on written briefs, and having, through their attorney, John A. Roberts, Jr., tendered in open court oral argument of the above-captioned actions to the intervenor railroads, acting by and through their attorney, R. Paul Tjossem; and the transcript of all of the proceedings before the Interstate Commerce Commission having been filed in the above-captioned proceedings and having been produced by the plaintiffs, being duly and regularly introduced as exhibits in the above-captioned causes; and no further testimony having been taken or evidence introduced by any party to the action; and the Court having heard oral argument, and being familiar with the records and files herein, and having heretofore announced its oral decision, and the Court having heretofore made and entered its written Findings of Fact and Conclusions of Law, it is now

Ordered, Adjudged and Decreed as follows:

I.

That it has jurisdiction over the subject matter and parties hereto.

II.

That the above-captioned cases be, and they hereby are, remanded to the Interstate Commerce Commission for the purpose of making and entering a reparations order consistent with the Findings of Fact and Conclusions of Law heretofore made by the Court herein.

III.

That the orders made by the Interstate Commerce Commission relating to the above-captioned cases be, and they hereby are, reversed, and these cases be, and they hereby are, remanded to the Interstate Commerce Commission for the purpose of fixing the amount of reparations due the plaintiffs, together with interest thereon, and the entry of a reparations order consistent with the Findings of Fact, Conclusions of Law and Judgment herein entered.

IV.

That plaintiffs be, and they hereby are, awarded judgment against intervening defendants for their taxable costs herein incurred.

Done in Open Court this 19th day of June, 1956.

/s/ JOHN C. BOWEN,

United States District Judge

Presented by:

/s/ ROBERT O. BERESFORD,
Of Wright, Booth & Beresford,
Attorneys for Acme Peat Products,
Ltd., et al., and Alouette Peat
Products, Ltd.

Affidavit of Service attached.

[Endorsed]: Filed June 19, 1956.

[Title of District Court and Causes 3923 and 3924.]

NOTICE OF APPEAL

Notice Is Hereby Given, that the Chicago, Milwaukee, St. Paul and Pacific Railroad Company, Union Pacific Railroad Company, Southern Pacific Company, Great Northern Railway Company, and Northern Pacific Railway Company, all corporations and intervening defendants in the above entitled consolidated actions, hereby appeal to the United States Court of Appeals for the Ninth Circuit from the final Judgment entered in these consolidated actions, dated June 19, 1956.

Dated this 13th day of August, 1956.

/s/ HAROLD G. BOGGS,
/s/ ROBERT F. GARING,
/s/ R. PAUL TJOSSEM,
Attorneys for Appellants

[Endorsed]: Filed August 13, 1956.

[Title of District Court and Causes 3923 and 3924.]

NOTICE OF APPEAL

Notice is hereby given that the Interstate Commerce Commission, one of the intervening defendants in the above-entitled action, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the Judgment entered in these actions on June 19, 1956.

/s/ ROBERT W. GINNANE,
General Counsel

/s/ C. H. JOHNS,
Asst. General Counsel, Inter-
state Commerce Commission

[Endorsed]: Filed August 18, 1956.

[Title of District Court and Cause No. 3923.]

CERTIFICATE OF CLERK

United States of America,
Western District of Washington—ss.

I, Millard P. Thomas, Clerk of the United States District Court for the Western District of Washington, do hereby certify that pursuant to the provisions of Subdivision 1 of Rule 10 of the United States Court of Appeals for the Ninth Circuit and Rule 75(o) FRCP and designations of counsel I am transmitting herewith the following original documents in the file dealing with the action as the record on appeal herein to the United States

Court of Appeals for the Ninth Circuit at San Francisco, said papers being identified as follows:

1. Complaint, filed April 15, 1955.
4. Motion of Union Pacific Railroad Company, et al., for Leave to Intervene, filed April 29, 1955.
5. Order Granting Union Pacific Railroad Company, et al., Leave to Intervene, filed April 29, 1955.
7. Answer of Intervening Defendant Railroads, filed June 2, 1955.
8. Answer of the U.S.A., filed June 15, 1955.
9. Intervention and Answer of Interstate Commerce Commission, filed June 16, 1955.
10. Stipulation for Consolidation, filed July 29, 1955.
11. Order Consolidating Actions, filed July 29, 1955.
22. Findings of Fact and Conclusions of Law, filed June 19, 1956.
23. Judgment, filed June 19, 1956.
25. Notice of Appeal of Chicago, Milwaukee, St. Paul and Pacific Railroad Company, et al., filed August 13, 1956.
26. Bond for Costs on Appeal, G. N. Railway Co., et al., filed August 13, 1956.
27. Notice of Appeal by Interstate Commerce Commission, filed August 18, 1956.
28. Praeipe for Record on Appeal, filed August 18, 1956.
29. Supplemental Praeipe for Record on Appeal by Intervening Railroads, filed August 21, 1956.
30. Court Reporter's Transcript of Proceedings (Statement of Facts), filed September 4, 1956.

31. Statement of Points on which Appellant Intervening Railroad Defendants Intend to Rely on Appeal, and Designation of Portions of the Record to be Printed, filed September 10, 1956.

I further certify that the following is a true and correct statement of all expenses, costs, fees and charges incurred in my office by or on behalf of appellants for preparation of the record on appeal in this action, to-wit: Notice of Appeal by Appellant Railroad Defendants, \$5.00; and Notice of Appeal by Appellant Interstate Commerce Commission, \$5.00; that the fee on behalf of the Railroad appellants has been paid to me, but the fee on behalf of the Interstate Commerce Commission has not been paid.

In Witness Whereof I have hereunto set my hand and affixed the official seal of said District Court at Seattle this 12th day of September, 1956.

[Seal] MILLARD P. THOMAS,
Clerk

/s/ By TRUMAN EGGER,
Chief Deputy Clerk

[Endorsed]: No. 15276. United States Court of Appeals for the Ninth Circuit. Chicago, Milwaukee, St. Paul and Pacific Railroad Company, Union Pacific Railroad Company, Southern Pacific Company, Great Northern Railway Company and Northern Pacific Railway Company, Appellants, vs. Allouette Peat Products, Ltd., Appellee. Interstate Commerce Commission, Appellant, vs. Alouette Peat Products, Ltd., Appellee. Transcript of Record. Appeals from the United States District Court for the Western District of Washington, Northern Division.

Filed: September 14, 1956.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

in the District Court of the United States, Western District of Washington, Northern Division

No. 3924

ACME PEAT PRODUCTS, LTD., et al.,

Plaintiffs,

vs.

UNITED STATES OF AMERICA,

Defendant.

COMPLAINT

Come now the plaintiffs and allege as follows:

I.

At all times mentioned herein plaintiffs were and now are corporations, existing under the laws of the Dominion of Canada, and were and now are engaged, among other things, in the marketing of peat, and had and have mailing addresses as given below:

Acme Peat Products, Ltd., 789 West Pender St., Vancouver, B. C.

Alouette Peat Products, Ltd., McTavish Road, Pitt Meadows, B. C.

Atkins & Durbrow, Ltd., Royal Bank Building, Vancouver, B. C.

Blundell Peat Co., 806 #6 Road, R.R. #2, Vancouver, B. C.

Byrne Road Peat Farms, 2707 McKay Avenue, Burnaby, B. C.

Coast Peat Co., Ltd., 1115 Vancouver Block, Vancouver, B. C.

Excelsior Peat Co., Ltd., 7675 Osler Avenue, Vancouver, B. C.

Lulu Island Peat Co., Ltd., R.R. #2, Eburne, B. C.

Northern Peat Moss Co., Ltd., No. 8 Rd. R.R. #2, Eburne, B. C.

Pacific Peat Products, Ltd., 1137 West Hastings St., Vancouver, B. C.

Richmond Peat Products, Ltd., 1137 West Hastings St., Vancouver, B. C.

Shafer-Haggart, Ltd., Vancouver, B. C.

Western Peat Co., Ltd., P. O. Box 699, New Westminster, B. C.

Prior to January 8, 1948, plaintiff, Atkins & Durbrow, Ltd. operated under the firm name of B. C. Peat Co., Ltd. On January 8, 1948, the firm name was officially changed to Atkins and Durbrow, Ltd., this being a change in name only and not an exchange of assets.

II.

That this action is brought under the laws of the United States of America Regulating Commerce, and particularly the Interstate Commerce Act, 49 U.S.C.A. Section 1 et seq. and 28 U.S.C.A. Section 1336. That this action is brought for the purpose of having this Court review the decision and Orders of the Interstate Commerce Commission set forth in Paragraph V below, and to set the said decisions and Orders aside.

III.

These proceedings originated in a Complaint filed by the above named plaintiffs with the Interstate

Commerce Commission on April 30, 1948, under C.C. Docket No. 29974. That the said Complaint was filed against the following named common carriers:

The Akron, Canton and Youngstown Railway Company,

The Alton Railroad Company,

The Alton Railroad Company (Henry A. Gardner, Trustee),

The Atchison, Topeka and Santa Fe Railway Company,

Atlantic Coast Line Railroad Company,

The Baltimore & Ohio Railroad Company,

Bellefonte Central Railroad Company,

The Belt Railroad Company of Chicago,

Boston & Maine Railroad,

British Columbia Electric Railway Company, Limited,

Burlington-Rock Island Railroad Company,

Camas Prairie Railroad Company,

Canadian National Railways,

Canadian Pacific Railway Company,

The Central Railroad Company of New Jersey (Walter P. Gardner, Trustee),

The Chesapeake and Ohio Railway Company,

Chicago, Burlington and Quincy Railroad Company,

Chicago, Great Western Railway Company,

Chicago, Indianapolis and Louisville Railway Company,

Chicago, Milwaukee, St. Paul and Pacific Railroad Company,

Chicago North Shore and Milwaukee Railway Company,

Chicago and North Western Railway Company,
Chicago, Rock Island and Pacific Railway Company,

Chicago, Rock Island and Pacific Railway Company (Joseph B. Fleming and Aaron Colnon, Trustees),

Chicago, St. Paul, Minneapolis and Omaha Railway Company,

Chicago, South Shore and South Bend Railroad Company,

The Colorado and Southern Railway Company,
The Colorado and Wyoming Railway Company,
The Delaware, Lackawanna and Western Railroad Company,

The Denver and Rio Grande Western Railroad Company,

The Denver and Rio Grande Western Railroad Company (Wilson McCarthy and Henry Swan, Trustees),

Duluth, Winnipeg and Pacific Railway Company,
Elgin, Joliet and Eastern Railway Company,

Erie Railroad Company,

Fort Worth and Denver City Railway Company,

Grand Trunk Western Railroad Company,

Great Northern Railway Company,

Green Bay and Western Railroad Company,

Gulf, Colorado and Santa Fe Railway Company,

Illinois Central Railroad Company,

Indiana Harbor Belt Railroad Company,

The Kansas City Southern Railway Company,

Kewaunee, Green Bay and Western Railroad Company,
Lehigh Valley Railroad Company,
The Long Island Railroad Company,
Louisiana & Arkansas Railway Company,
Louisville and Nashville Railroad Company,
Midland Continental Railroad,
The Minneapolis & St. Louis Railway Company,
Minneapolis, Northfield and Southern Railway,
Minneapolis, St. Paul and Saulte Ste. Marie Railroad Company,
Minnesota Western Railway Company,
Missouri-Kansas-Texas Railroad Company,
Missouri-Kansas-Texas Railroad Company of Texas,
Missouri Pacific Railroad Company (Guy A. Thompson, Trustee),
The Nashville, Chattanooga & St. Louis Railway,
The New York and Long Branch Railroad Company,
The New York Central Railroad Company,
The New York, Chicago and St. Louis Railroad Company,
The New York, New Haven and Hartford Railroad Company,
The New York, New Haven and Hartford Railroad Company (Howard S. Palmer, James Lee Loomis, Henry B. Sawyer, Trustees),
Norfolk and Western Railway Company,
Northern Pacific Railway Company,
Northwestern Pacific Railroad Company,
Oregon Trunk Railway,

Pacific Electric Railway Company,
 The Pennsylvania Railroad Company,
 Pere Marquette Railway Company,
 Petaluma and Santa Rosa Railroad Company,
 The Pittsburgh and West Virginia Railway Com-
 pany,
 Reading Company,
 Sacramento Northern Railway,
 The St. Louis, Brownsville and Mexico Railway
 Company (Guy A. Thompson, Trustee),
 St. Louis-San Francisco Railway Company,
 St. Louis, Southwestern Railway Company (Ber-
 ryman Henwood, Trustee),
 St. Louis Southwestern Railway Company of
 Texas,
 St. Louis Southwestern Railway Company of
 Texas (Berryman Henwood, Trustee),
 San Diego and Arizona Eastern Railway Com-
 pany,
 Seaboard Air Line Railroad Company,
 Southern Pacific Company,
 Southern Railway Company,
 Spokane International Railroad Company,
 Spokane, Portland and Seattle Railway Company,
 The Texas Mexican Railway Company,
 Texas and New Orleans Railroad Company,
 The Texas and Pacific Railway Company,
 Tidewater Southern Railway Company,
 The Toronto, Hamilton and Buffalo Railway
 Company,
 Union Pacific Railroad Company,
 Wabash Railroad Company,

Western Maryland Railway Company,
The Western Pacific Railroad Company,
The Wheeling and Lake Erie Railway Company,
The Yazoo and Mississippi Valley Railroad Company.

That the said Complaint, being I.C.C. Docket No. 29974, charged the defendants therein with assessing rates in violation of Sections 1, 3, and 6 of the Interstate Commerce Act, as amended. That the said Complaint prayed that the defendant carriers be ordered to refund overcharges to the complainants and that rates in violation of the Interstate Commerce Commission Order in Ex Parte 162 be reissued and republished so as to comply with the said I.C.C. Order in Ex Parte 162. Plaintiffs allege that the defendant carriers have, since the filing of the said Complaint, complied with Ex Parte 162 rates; and that there is no present violation of the Act, by these defendant carriers, within the scope of the said Complaint filed before the Interstate Commerce Commission. Plaintiffs allege that no review is being sought in regard to, or relief asked as to present rates charged by the aforesaid railroads in this proceeding.

IV.

That the Interstate Commerce Commission set the said Complaint of plaintiffs' above named for hearing, and gave notice of said hearing, and said hearing was commenced at the City of Seattle, Washington, on the 10th day of November, 1948, before George J. Hall, one of the examiners of the said Interstate Commerce Commission. That plain-

tiffs appeared at said hearing by their attorney. That witnesses were sworn and evidence taken and exhibits admitted at the said hearing, and the said hearing was concluded on November 10, 1948. That, thereafter, briefs were filed by complainants and defendants, and, thereafter, a proposed report was issued by examiners George J. Hall, and L. H. Dishman of the Interstate Commerce Commission. That the said proposed report found that complainants' Complaint before the Interstate Commerce Commission should be dismissed. That, thereafter, complainants filed Exceptions to the proposed report, and defendants filed their Reply to exceptions of Complainants. That oral argument was had before the Interstate Commerce Commission at Washington, D. C. on November 17, 1949.

That on the 7th day of April, 1950, the Interstate Commerce Commission entered its Findings and Conclusions and Order, said Order awarding reparation to complainants, and ordering unauthorized increases removed, and granting relief to complainants as prayed for in their Complaint filed with the Interstate Commerce Commission. That a true copy of the said Findings & Conclusions and Order of April 7, 1950 is attached hereto as Exhibit A and is hereby made a part hereof as if set forth at length herein.

That, thereafter, and in accordance with the Rules of the Interstate Commerce Commission, defendants filed their Petition for Reconsideration by the Entire Commission and for Argument, and complainants filed their Reply thereto. That on the

7th day of January, 1952, the Interstate Commerce Commission issued its decision and Order denying defendants' Petition for Reconsideration by the Entire Commission and for Oral Argument. That a true copy of the said Order of January 7, 1952, is attached hereto as Exhibit B and is hereby made a part hereof as if set forth at length herein.

That, thereafter, and on the 30th day of December, 1953, the Interstate Commerce Commission issued its Supplemental Order ordering defendant carriers listed in said Order to pay unto the complainants, on or before February 19, 1954, the amounts set opposite their respective names in the aforesaid Order of December 30, 1953. That a true copy of the said Order of December 30, 1953, is attached hereto as Exhibit C and is hereby made a part hereof as if set forth at length herein. That four of the said defendants partially complied with the said Order of December 30, 1953, by paying reparations to the plaintiffs herein.

V.

That, thereafter, defendants in I.C.C. Docket No. 29974 filed with the Interstate Commerce Commission a Petition for Leave to File Petition to Reopen and Reconsider, and their Petition to Reopen For Reconsideration, said Petitions being dated March 2, 1954. That complainants filed their Reply to both of defendants' said Petitions. That on June 21, 1954, the Interstate Commerce Commission issued its Order granting the defendants' Petition For Leave to File, and the Commission reopened the

said proceedings for reconsideration. That a true copy of the said Order of June 21, 1954 is attached hereto as Exhibit D and is hereby made a part hereof as if set forth at length herein. That complainants' request for oral argument upon defendants' Petition to Reopen For Reconsideration was denied. That on October 4, 1954, the Interstate Commerce Commission issued its Findings and Conclusions and Order denying relief to complainants and dismissing complainants' Complaint. That a true copy of said Findings and Conclusions and Order of October 4, 1954 is attached hereto as Exhibit E and is hereby made a part hereof as if set forth at length herein. That, thereafter, complainants filed their Petition For Reconsideration of the Commission's decision dated October 4, 1954, and the defendants replied to the said Petition. That on January 3, 1955, the Interstate Commerce Commission issued its Order denying plaintiffs' Petition For Reconsideration. That a true copy of said Order of January 3, 1955, is attached hereto as Exhibit F and is hereby made a part hereof as if set forth at length herein.

VI.

That the Interstate Commerce Commission erred in making and entering its Order of June 21, 1954, granting defendants' Petition For Leave to File Petition to Reopen and Reconsider, and the Interstate Commerce Commission erred in reopening the said proceedings and in entertaining the defendants' Petition to Reopen For Reconsideration. That the Commission was without authority of law and

was without jurisdiction in entering the Order of June 21, 1954, as follows:

1. That the said Commission had no authority to reconsider its final Order;
2. That the reconsideration was contrary to the established rules of procedure of the said Commission;
3. That some or all of defendant carriers were in default at the time the said Order of June 21, 1954 was granted;
4. That the Final Order of the Commission dated April 7, 1950, had been partially complied with by defendant carriers at the time of the granting of the Order of June 21, 1954;
5. That the reconsideration by the Commission denied to plaintiffs due process of the law.

VII.

That the Findings and Conclusions and Order entered by the Interstate Commerce Commission on October 4, 1954, and the Order of January 3, 1955, denying a reconsideration to plaintiffs, were and are, and each of them is unlawful and based on a misapplication of law and were and are otherwise arbitrary, capricious, and without support in and contrary to the law and the evidence, and that the Conclusions in the Order of October 4, 1954, were and are not supported by the Findings, and that the Findings in the said Order of October 4, 1954 were and are not supported by any substantial evidence whatsoever. Plaintiff more specifically shows for grounds of review as follows:

1. There is no evidence, or no substantial evidence, in the record to support the Finding of Fact of the Commission as set forth on Sheet 6, last full paragraph, and paragraph on bottom of Sheet 6 and top of Sheet 7 that there is no evidence of unreasonableness in the assailed rates. That the Commission erred in failing to find that the assailed rates were unreasonable.

2. There is no evidence, or no substantial evidence, in the record to support the Finding of Fact of the Commission as set forth on Sheet 2, last paragraph, and in the paragraph on the bottom of Sheet 6, and the top of Sheet 7 that there is no showing of undue prejudice. That the Commission erred in failing to find that the actions of the defendant carriers, in publishing rates contravening an Order of the Commission and/or publication of said rates on short notice without authority created undue prejudice to the complainants.

3. That the conclusion of the Commission, as set forth on Sheet 2, first full paragraph, and paragraph at the bottom of Sheet 6, and the top of Sheet 7 that the assailed rates are applicable is contrary to law and the whole of the evidence.

4. That the conclusion of the Commission, as set forth on Sheet 3, first full paragraph, that improper tariff publication does not give rise to unreasonableness is contrary to law and the whole of the evidence, and denies to these plaintiffs due process of the law.

5. That the conclusion of the Commission as set forth on Sheet 3, first full paragraph, and Sheet 2,

first full paragraph, that reparations are not allowable for improper tariff publication, is contrary to law and the whole of the evidence, and denies plaintiffs herein the due process of law.

6. The Commission erred in failing to find that publication of rates by defendant carriers, without proper statutory notice, makes the rates inapplicable to plaintiffs.

7. The Commission erred in concluding as a matter of law that complainants' Complaint be dismissed upon the ground that the Commission made no finding that the assailed rates were reasonable and the said Order of October 4, 1954, is not supported by any Finding of Fact that the rates assailed were reasonable.

8. That the Commission erred in failing to give due and proper consideration to the Findings and Conclusions and Final Order entered by the Commission on April 7, 1950, and erred in reversing said Findings and Conclusions and Order of April 7, 1950, in that the said Findings, Conclusions and Order of April 7, 1950, were each and all supported by substantial evidence and in accordance with the law.

9. That the Commission erred in entering its Order of October 4, 1954, and the whole thereof herein, upon the ground that said Order, and the whole thereof, is unsupported by Conclusions of Law, and Findings of Fact supported by substantial evidence upon the record considered as a whole, and is contrary to law.

Wherefore, plaintiffs pray this Honorable Court as follows:

1. That this Court take jurisdiction of the proceedings, and of the questions determined therein, and that this Court review all of the said records and proceedings had by the Interstate Commerce Commission in this matter; that the Court make and enter its Order and Decree that the said Orders of June 21, 1954, October 4, 1954, and January 3, 1955, made by the said Interstate Commerce Commission, be annulled, vacated, and set aside; that this Court make and enter its Decision and Order awarding reparation to plaintiffs of all sums charged by the common carriers listed in Paragraph III herein, in excess of the rates legally chargeable by said carriers, and make and enter herein Findings of Fact, and Conclusions of Law, and Decision consistent and in accordance with the evidence and the law in this cause; that the Court further make such decision and Order as shall be appropriate in the premises.

2. That this Court make and enter its Order directed to the Interstate Commerce Commission requiring the said Interstate Commerce Commission to certify fully to this Honorable Court, at a specified time and place, all of the records and proceedings of the said Interstate Commerce Commission in the said ICC Docket No. 29974, including all Orders and decisions therein, the transcript of all testimony, together with all the exhibits or copies thereof introduced, and the written briefs filed by the parties herein, and the transcript of

oral argument had before the said Commission, and the pleadings, and all files, filings, correspondence, records and proceedings in the said cause, to the end that they may be made a part of the record before this Court, so that this Court may review the lawfulness of the said acts of the Commission.

3. Plaintiffs further pray for their costs and disbursements herein.

WRIGHT, BOOTH & BERESFORD
/s/ ROBERT O. BERESFORD and
/s/ JOANN R. LOCKE

Attorneys for plaintiffs

[Endorsed]: Filed April 15, 1955.

[Title of District Court and Cause No. 3924.]

MOTION FOR LEAVE TO INTERVENE

Come Now the Chicago, Milwaukee, St. Paul and Pacific Railroad Company, Union Pacific Railroad Company, Southern Pacific Company, Great Northern Railway Company and Northern Pacific Railway Company, and pursuant to Title 28, Section 2323, petition the Court for an order granting leave to the above named petitioners to intervene herein as defendants, and in support thereof show the Court as follows:

I.

That each of the above named petitioners operates a line of railroad as a common carrier in interstate commerce and as such are subject to regula-

tion by the Interstate Commerce Commission under Part I of the Interstate Commerce Act.

II.

That each of the above named petitioners were parties defendant in the cause No. 29974 entitled Acme Peat Products, Ltd., et al, vs. The Akron, Canton and Youngstown Railway Company, et al., lately pending before the Interstate Commerce Commission.

III.

That the purpose of this action is to have this Court annul, vacate and set aside the final order of the Interstate Commerce Commission entered in said Cause No. 29974 dismissing plaintiffs' complaint against your petitioners, and therefore your petitioners have a direct and substantial interest in this proceeding.

/s/ HAROLD G. BOGGS

/s/ ROBERT F. GARING

/s/ R. PAUL TJOSSEM

Attorneys for Petitioners

Acknowledgment of Service Attached.

[Endorsed]: Filed April 29, 1955.

[Title of District Court and Cause No. 3924.]

ORDER GRANTING LEAVE TO INTERVENE

This Cause coming on to be heard on the 29th day of April, 1955 on the petition of Chicago, Milwaukee, St. Paul and Pacific Railroad Company,

Union Pacific Railroad Company, Southern Pacific Company, Great Northern Railway Company and Northern Pacific Railway Company, for leave to intervene in the above entitled suit and to be made party defendants thereto, and the petition having been duly considered, and it appearing to the Court that the above named petitioners have an interest in the above entitled suit sufficient to warrant each of them becoming a party to this suit, It Is Therefore,

Ordered, Adjudged and Decreed that the Chicago, Milwaukee, St. Paul and Pacific Railroad Company, Union Pacific Railroad Company, Southern Pacific Company, Great Northern Railway Company and Northern Pacific Railway Company be, and each of them hereby is granted leave to intervene in said suit as a party defendant.

Done in open Court this 29th day of April, 1955.

/s/ JOHN C. BOWEN

United States District Judge

Presented by:

/s/ R. PAUL TJOSSEM

Of Attorneys for Petitioners.

Acknowledgment of Service Attached.

[Endorsed]: Filed April 29, 1955.

In The District Court of The United States, Western District of Washington, Northern Division

No. 3924

ACME PEAT PRODUCTS, LTD., et al.,
Plaintiffs,

v.

UNITED STATES OF AMERICA,
Defendant,

and

CHICAGO, MILWAUKEE, ST. PAUL, AND
PACIFIC RAILROAD COMPANY, et al.,
Intervening Defendants.

ANSWER OF INTERVENING DEFENDANT
RAILROADS

Come Now the Chicago, Milwaukee, St. Paul and Pacific Railroad Company, Union Pacific Railroad Company, Southern Pacific Company, Great Northern Railway Company and Northern Pacific Railway Company, intervening defendants, and answer the complaint of the plaintiffs herein as follows:

I.

Admit the allegations in paragraphs I and II of said complaint.

II.

Admit the allegations of paragraph III of said complaint, and allege that these defendants in pub-

lishing and charging the rates therein described did not and have not violated any provision of the Interstate Commerce Act, 49 U.S.C.A. Sections 1, 3, and 6, as amended, or any order of the Interstate Commerce Commission entered pursuant thereto.

III.

Admit the allegations of paragraph IV of said complaint except the allegation "That four of the said defendants partially complied with the said order of December 30, 1953, by paying reparations to the plaintiffs herein," as to which allegation these defendants, for lack of information, neither admit nor deny, and allege that none of defendant parties to this answer have paid reparations pursuant to said order.

IV.

Admit the allegations in paragraph V of plaintiffs' complaint.

V.

Deny each and every allegation contained in paragraphs VI and VII of plaintiffs' complaint.

Wherefore, having fully answered the complaint of the plaintiffs herein, these intervening defendants pray that judgment be entered affirming the orders of the Commission entered in said cause, I.C.C. Docket 29974, dated October 4, 1954 and January 3, 1955; that the plaintiffs take nothing by their complaint in this cause; that the same be dismissed; and that these intervening defendants be awarded their costs and disbursements incurred in

defending this cause; and that the Court grant such other and further relief as in the premises appears equitable and just.

/s/ HAROLD G. BOGGS

/s/ ROBERT F. GARING

/s/ R. PAUL TJOSSEM

Attorneys for Intervening
Defendant Railroads

Acknowledgment of Service Attached.

[Endorsed]: Filed June 2, 1955.

[Title of District Court and Cause No. 3924.]

ANSWER OF THE UNITED STATES OF
AMERICA

Now comes the United States of America, as defendant herein, and in answer to the Complaint says:

I.

This is a Complaint seeking to set aside an order of the Interstate Commerce Commission. The Interstate Commerce Act contains provisions adequate for the protection of the Commission's orders at the hands of the Commission and of the railroads, when as here, they are the real parties in interest [28 U.S.C.A. Sec. 2323].

II.

The Commission's order challenged herein involves the same parties, the same disputes, and the same claims for money damages as were involved in

he proceedings before the Commission. The interested governmental agency, i.e., the Interstate Commerce Commission, will avail itself of the statutory authorization to interpose all defenses to the shipper's charges and claims possible of being interposed. Thus the Commission, and the railroads, if they so elect, will have an opportunity to present their respective positions through their own counsel. Under these circumstances, and in view of these facts, the United States does not oppose the Commission's order, but does not participate in its defense.

III.

Accordingly, the United States neither admits nor denies any of the allegations of the Complaint.

/s/ JAMES E. KILDAY

/s/ JOHN H. D. WIGGER

Special Assistants to the
Attorney General

STANLEY N. BARNES

Assistant Attorney General

CHARLES P. MORIARTY

United States Attorney

/s/ By F. N. CUSHMAN

Assistant U. S. Attorney

Attorneys for the United States
of America

Certificate of Service Attached.

[Endorsed]: Filed June 15, 1955.

[Title of District Court and Cause No. 3924.]

INTERVENTION AND ANSWER OF INTER- STATE COMMERCE COMMISSION

Comes now the Interstate Commerce Commission and pursuant to the provisions of U.S. Code, Section 2323 (28 U.S.C. 2323), hereby intervenes as of right as a party defendant in the above-entitled cause, enters the appearance of its counsel therein, and for answer to plaintiffs' complaint, says:

First Defense

This Court lacks venue to entertain this suit because Title 28 U.S. Code, Section 1398, specifically provides that "any civil action to enforce, suspend or set aside in whole or in part an order of the Interstate Commerce Commission shall be brought only in the judicial district wherein is the residence or principal office of any of the parties bringing such action", and nowhere in the complaint is it alleged that plaintiffs or any of them have their residences or principal offices within the judicial district in which this suit is brought. On the contrary it is alleged in the first paragraph of the complaint herein that plaintiffs are Canadian corporations engaged in the marketing of peat, with addresses in the cities and towns in British Columbia, Canada, referred to in paragraph I of said complaint; therefore, plaintiffs are without standing to maintain this suit.

Second Defense

Without waiving its foregoing defense, and fur-

her answering the plaintiffs' complaint herein, the Commission answers and says:

I.

Answering the allegations of paragraphs I, II and III of the plaintiffs' complaint, the Commission admits the same, except that as to the allegation contained in the last unnumbered paragraph of paragraph III, the Commission denies any implication that the rates charged on plaintiffs' shipments were unlawful.

II.

Answering the allegations of paragraph IV of the plaintiffs' complaint, the Commission admits that hearings were held before its examiner as alleged and that a proposed report was issued containing a recommendation that plaintiffs' complaint should be dismissed. It is also admitted that following the filing of exceptions to the proposed report and replies to exceptions that oral argument was had before the Commission as alleged. It is further admitted that on April 7, 1950, Division 2 of the Commission served its report and order finding that the assailed rates were applicable, but were unjust and unreasonable and concluded that plaintiffs were entitled to an award of reparations based upon the findings contained in its said report (277 I.C.C. 641), to which the Court is referred for a full, true and accurate statement of such findings and conclusions. The remaining allegations of said paragraph are admitted.

III.

Answering the allegations of paragraph V of plaintiffs' complaint herein, the Commission admits the same.

IV.

Answering the allegations of paragraph VI of plaintiffs' complaint herein, the Commission denies that it erred in making and entering its order of June 21, 1954, or that it acted beyond the scope of its authority and jurisdiction for any of the reasons alleged in said paragraph or for any other reason or reasons.

V.

Answering the allegations of paragraph VII of plaintiffs' complaint, the Commission denies that the orders referred to therein are unlawful and are based on misapplication of law and are arbitrary and capricious and without support in the law, and denies that its said order of October 4, 1954, is not supported by adequate findings and conclusions and substantial evidence and further denies that its said order is invalid for any of the reasons stated in said paragraph or for any other reason or reasons.

Answering paragraph 2 of plaintiffs' prayer (complaint pages 10-11), the Commission avers that there is no statutory requirement that the Court issue an order directing the Commission to prepare and certify the records and proceedings had before it in Docket I.C.C. No. 29974, as part of the record to be presented to this Court for review of the actions of the Commission in this cause. In this connection the Commission avers that it is the duty and

obligation of plaintiffs to obtain the record from the Commission (Wilson v. United States, 114 F. Supp. 314, 821; Mississippi Valley Barge Co. v. United States, 292 U.S. 282, 286-287) for introduction in Court, and the Commission also avers that upon request of plaintiffs and the payment by them of a nominal fee to cover the cost of preparation, a certified copy of the record may be obtained from the Secretary of the Commission for that purpose. (Section 1006(d), Title 5 U.S.C.)

Except as herein expressly admitted the Commission denies the truth of each of and all the allegations contained in the complaint, insofar as they conflict with the allegations herein.

All of which matters and things the Commission is ready to aver, maintain and prove as this Honorable Court shall direct and hereby prays that said complaint be dismissed.

INTERSTATE COMMERCE
COMMISSION,

/s/ By SAMUEL R. HOWELL,
Associate General Counsel

Certificate of Service Attached.

[Endorsed]: Filed June 16, 1955.

[Title of District Court and Cause No. 3924.]

CERTIFICATE OF CLERK

United States of America,
Western District of Washington—ss.

I, Millard P. Thomas, Clerk of the United States

District Court for the Western District of Washington do hereby certify that pursuant to the provisions of Subdivision 1 of Rule 10 of the United States Court of Appeals for the Ninth Circuit and Rule 75(o) FRCP and designations of counsel I am transmitting herewith the following original documents and papers in the file dealing with the action as the record on appeal herein to the United States Court of Appeals for the Ninth Circuit at San Francisco, said papers being identified as follows:

1. Complaint, filed Apr. 15, 1955.
4. Motion Chicago, Milwaukee, St. Paul and Pacific Railroad Company et al. to intervene, filed Apr. 29, 1955.
5. Order Granting Leave to Intervene, filed Apr. 29, 1955.
7. Answer of Intervening Defendant Railroads, filed June 2, 1955.
8. Answer of United States of America, filed June 15, 1955.
9. Intervention and Answer of Interstate Commerce Commission, filed June 16, 1955.
10. Copy of Notice of Appeal of Appellant Railroads, filed 8/13/56.
11. Copy of Bond for Costs on Appeal, filed 8/13/56.
12. Copy of Notice of Appeal of ICC, filed 8/18/56.
13. Copy of Praecipe for Record on Appeal of I.C.C., filed 8/18/56.
14. Copy of Supplemental Praecipe for Record on Appeal (Railroads), filed Aug. 21, 1956.

In Witness Whereof I have hereunto set my hand and affixed the official seal of said District Court at Seattle this 12th day of September, 1956.

[Seal] MILLARD P. THOMAS,
 Clerk,

/s/ By TRUMAN EGGER,
 Chief Deputy Clerk

[Endorsed]: No. 15277. United States Court of Appeals for the Ninth Circuit. Chicago, Milwaukee, St. Paul and Pacific Railroad Company, Union Pacific Railroad Company, Southern Pacific Company, Great Northern Railway Company and Northern Pacific Railway Company, Appellants, vs. Acme Peat Products, Ltd., et al., Appellees. Interstate Commerce Commission, Appellant, vs. Acme Peat Products, Ltd., et al., Appellees. Transcript of Record. Appeals from the United States District Court for the Western District of Washington, Northern Division.

Filed: September 14, 1956.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

[Title of District Court and Causes Nos. 3923 and 3924.]

STATEMENT OF FACTS

Be It Remembered that the above entitled and numbered causes were consolidated for hearing and

heard before the Honorable John C. Bowen, a Judge of the above entitled Court, beginning Tuesday, June 12, 1956, at 10:00 o'clock a.m.

The plaintiffs were represented by Mr. Robert O. Beresford and Miss JoAnn R. Locke, of Messrs. Wright, Booth & Beresford, Attorneys at Law.

The defendant was represented by Mr. John A. Roberts, Jr., Assistant United States Attorney.

The interveners were represented by Mr. R. Paul Tjossem, Attorney at Law.

Whereupon, the following proceedings were had and done, to-wit: [2]*

The Court: In Case No. 3923, entitled Alouette Peat Products, Ltd., vs. the United States of America and others, and also in Case No. 3924, entitled Acme Peat Products, Ltd., and others, vs. United States of America, et al., those cases having been previously consolidated for trial, I ask are each of the parties and their Counsel ready to proceed with the trial of those two cases?

Mr. Tjossem: The intervening defendants are ready, your Honor.

Miss Locke: The plaintiffs are ready, your Honor.

Mr. Roberts: The defendant United States of America is present, your Honor, and has tendered the defense to the Interstate Commerce Commission, whom I also represent in this court.

The Court: Any other parties represented by separate Counsel? (No response.) How long do

* Page numbers appearing at foot of page of original Reporter's Transcript of Record.

plaintiffs' Counsel estimate, Mr. Beresford, that these two cases together will take to try?

Mr. Beresford: Your Honor, this being an appeal on the record alone, I would certainly think that the cases could readily be concluded today. It is primarily a matter of argument. In fact, it is entirely a matter of argument. Of course, we have [3] filed our brief and I believe the Interstate Commerce Commission filed their brief last week. To some extent the argument will be circumscribed if the Court has had the opportunity to read those briefs——

The Court: I will say this: The Court has been reading the record, but the Court will require Counsel for each litigant to point out in writing every statement in every printed or mimeographed or photographed record, every statement which Counsel for the party concerned believes has anything to do with the factual or legal situation involved in these two cases, and I want you to make a written list of it so that there will be no doubt about the Court's having called to its attention specifically the very statement in the record, the specific and identical statement in this record, especially this record that comes from the Interstate Commerce Commission. I emphasize that in particular because it is a voluminous, burdensome record and one, no matter how careful in trying to read it and digest it, might overlook a statement which would be a very material statement, and I do not wish to do that.

Mr. Beresford: Yes, your Honor.

The Court: So, having that suggestion in mind,

I ask you how long you think it will take to try [4] these two cases. The Court will not accept submission of the cases for trial until that is done.

Mr. Beresford: I still think it can be done in one day, your Honor.

The Court: Very well. What, Mr. Tjossem, do you think will be the time needed to try these cases?

Mr. Tjossem: It is my understanding that the Interstate Commerce Commission has requested and received permission to submit their argument on brief, and I have been asked if I would handle some of their points in oral argument, so that I will have to not only cover the intervening defendant railroads' position but some of the Interstate Commerce Commission position. I might say, your Honor, that our positions are substantially identical. However, I think that if we are going into a full argument that this case should take the full day and part of tomorrow.

The Court: Mr. Roberts, have you any opinion different or in addition to what has been stated?

Mr. Roberts: I have not, your Honor. I concur completely in Mr. Tjossem's remarks.

The Court: Do the statements made represent all the litigants?

Mr. Roberts: They do, your Honor.

Mr. Beresford: Yes, your Honor. [5]

The Court: I wish now to proceed with the trial of the Peat cases which are consolidated for trial. I cannot tell how much of the trial of the Peat cases will be strictly argument and comments by Counsel on the record as distinguished from efforts by Coun-

sel to make a record of fact. I cannot tell that in advance, but it would be a great convenience to the reporter if he knew by an indication from Counsel when they feel certain that the trial is finished and the argument begun what their attitude is about having the reporter present to report argument. From what I gather from the statements of Counsel I suspect that a large percentage, perhaps by far the greater portion of your time will be taken up in argument rather than in the introduction of evidence in the trial. Have you any desire that your arguments be reported, Mr. Beresford?

Mr. Beresford: Your Honor, as far as the plaintiff is concerned there will be no attempt to introduce any evidence. We regard this primarily—as entirely a matter of argument. It's an appeal, and my recollection is we can't introduce evidence at this stage of the proceedings. The evidence has all been disposed of and introduced, rather, before the administrative board; in answer to the first query [6] raised by the Court. In answer to the second, I see no reason why the oral argument should be transcribed. It is certainly——

The Court: It is rather expensive to have it transcribed and I guess the opposing side at least thinks it is not worth the cost. Maybe the one making the argument sometimes might think it would be, but the opposing side usually feels that is true. What is the attitude of other Counsel about reporting arguments?

Mr. Tjossem: If the Court please, if it would be of any assistance to the Court, why we would be

glad to contribute to the cost of having the argument transcribed, and make that offer.

The Court: You should make arrangements with the reporter first about it. Is there any——

Mr. Tjossem: We have no particular reason to have the argument transcribed.

The Court: Does the United States wish to go to the expense of transcribing the argument?

Mr. Roberts: No, your Honor, I have no request one way or another on that. I will leave it to other Counsel.

The Court: Does Mr. Tjossem and does Mr. Roberts share the suggestion of Mr. Beresford that there is not to be offered any factual data in addition [7] to that which is already properly before the Court? Is there anything else in the way of facts to be added to what you already have properly before the Court at this time in the way of facts?

Mr. Tjossem: If the Court please, we have no evidence, but it is our position and the position of the Interstate Commerce Commission that there is nothing now before this Court.

The Court: Don't you see what I am after, Mr. Tjossem? I want to know whether this reporter ought to be here to get into the record some more facts which are not already there.

Mr. Tjossem: Well, that's what I'm trying to answer, your Honor. As I understand, what has happened in this proceeding is that the plaintiffs have obtained a record from the Interstate Commerce Commission which your Honor permitted them to file with the clerk of this court. The statute under

which this case is being tried permits the record of the Interstate Commerce Commission to be introduced as evidence in this case and thereupon the case shall proceed as in any other civil cause.

Now, the mere filing of this transcript with the clerk, it is our position, does not bring that record before your Honor in this case. [8]

The Court: At this time it is proper for the plaintiffs to make an opening statement of what plaintiffs think the proof will be in this case, and I will hear you from your present stations in making that opening statement.

Mr. Beresford: Your Honor.

The Court: Mr. Beresford.

Mr. Beresford: I think I correctly understand the Court. In this situation it will not be necessary to make an opening statement as to what the evidence will be, since there will be no evidence introduced on the part of the plaintiff.

The Court: Then you may waive that. At this time or later on at some proper stage of the trial defendants and all others opposed to the plaintiffs' case may make an opening statement of what they think the proof will be if they feel that is worth their time and effort. If they do not feel so, it is appropriate for them to waive opening statement. Does the United States of America wish to make an opening statement at this time?

Mr. Roberts: No, your Honor, not at this time, and at further proceedings before this Court the United States will relinquish its time, so to speak, to the intervener railroads. [9]

The Court: Does the Interstate Commerce Commission, the intervening defendant in Cause No. 3924, wish at this time to make an opening statement?

Mr. Roberts: The Interstate Commerce Commission, if your Honor please, will also relinquish its time as to the making of an opening statement and waive its right to do so, passing to the intervener railroads the position of representing not only the railroads but the position of the Commission in this hearing.

The Court: If there is any railroad or any other litigant who has filed an appearance in either one of these cases, I ask you, that litigant, through its Counsel, if that litigant or any one of the railroad litigants wish now to make an opening statement. If so, the Court will hear you. Does any railroad wish to? Hearing no reply, you may proceed with the trial of the case, and I would like to know now who it is who is appearing. I see that the answer of the intervening railroads was filed June 2, 1955, in Cause No. 3923, and those railroads appear to be the following: Union Pacific Railroad Company, a corporation; Southern Pacific Company, a corporation; Great Northern Railway Company, a corporation, and Northern Pacific Railway Company, a corporation as intervening defendants, and [10] in particular does any one of those intervening defendants wish to make an opening statement at this time?

Mr. Tjossem: If the Court please, I am here rep-

representing all of the appearing railroad intervening defendants, and when I speak——

The Court: Did I succeed in naming all of those who have so appeared?

Mr. Tjossem: Yes. All of the railroads who are appearing in this case as interveners are parties to the answer and you have read all of them, and I am appearing here in behalf of all of those parties.

If the Court please, I would still like to make my record here if I could. In light of the statement——

The Court: At this point, unless there is some reason why you do not wish to do so, it would be appropriate for you to advise the Court whether any one of those defendants wishes to have their Counsel make at this time an opening statement of what they think the proof will be.

Mr. Tjossem: No, all of the appearing railroad defendants waive their right to make an opening statement and would like to reserve that to a later time. [11]

The Court: That is approved by the Court. Now if you feel there is something important that you should say now before the plaintiffs begin their case in chief, you may do that, Mr. Tjossem.

Mr. Tjossem: Yes. I would like at this time on behalf of the Interstate Commerce Commission and the appearing intervening railroad defendants to move and do move to dismiss this cause for the reason that there is no evidence in this record on which the Court may proceed and that the cause should be dismissed for failure of proof.

The Court: The motion is denied. Now the plaintiffs may now proceed with their case in chief.

Mr. Beresford: Your Honor, we have filed a transcript of proceedings.

The Court: What date was that filed, Mr. Beresford? For the record, Mr. Tjossem, may I ask, is it your understanding that the answer of the intervening defendant railroads was joined in by each and all of those railroads whose names I a moment ago called out?

Mr. Tjossem: Yes, that's correct, your Honor.

The Court: I believe there is one additional, the Chicago, Milwaukee, St. Paul and——

Mr. Tjossem: Yes. I thought you read that. [12]

The Court: I don't remember seeing that. Counsel should see to it that the record is here. I understand it is not here and we have to wait now until the clerk sends down to see if he can find it. You ought to see that the record is here.

Mr. Tjossem, in the answer I referred to a few moments ago, the first one that I mentioned, that one filed in Cause No. 3923 on June 2nd, did not in the caption have the name of the Milwaukee.

Mr. Beresford, I think you had better go to the clerk's office and see that there is obtained what you want the Court to look at in this case and consider. Be sure to expedite your mission and to return as soon as possible.

(Brief pause.)

The Court: All are present again. Referring to the identity of the intervening defendants, do they wish the Court to understand that there have ap-

appeared in the case the following, and I am now referring to Cause No. 3923, the following such intervening defendants: The ones that I have already mentioned in that case and in addition thereto the railroad company whose corporate name is sometimes spoken Chicago, Milwaukee, St. Paul and Pacific Railroad Company? Is that the desire of all the defendants, to have all of those [13] railroads already named and also this last one named by the Court as appearing in Cause No. 3923?

Mr. Tjossem: If the Court please, the Chicago, Milwaukee, St. Paul and Pacific Railroad Company was not a party to the proceedings before the Interstate Commerce Commission entitled *Alouette Peat Products, Ltd., vs. United States of America*.

The Court: Mr. Tjossem, I am not concerned with that now. I am concerned with the answer to any question so as to make this record clear whom you wish to be appearing or regarded by the Court as appearing as intervening defendant railroads in this case.

Mr. Tjossem: In the consolidated cases you have named the intervening railroad defendants, your Honor.

The Court: Do they wish and do each and all of them wish the Court to understand that those railroad intervening defendants are now before this Court as such intervening defendants?

Mr. Tjossem: That is correct, your Honor.

The Court: Now, in Cause No. 3924 do the intervening defendants wish the very same identical rail-

roads, each and all of them, to be regarded by the Court as appearing in that case?

Mr. Tjossem: That is correct, your Honor. [14]

The Court: Very well. Do the plaintiffs have any objection?

Mr. Beresford: Not at all, your Honor.

The Court: Then the Court so regards with respect to the identity and fact of appearance of each and all of the intervening railroad defendants named by the Court. The plaintiffs may proceed with the introduction of plaintiffs' evidence in these cases.

Mr. Beresford: Your Honor, all I have for the case are exhibits—excuse me, are the transcripts of the proceeding before the Interstate Commerce Commission which have hitherto been filed with this court on March the 13th—

The Court: Do you wish to take those things in your hand and request that they be passed forward to the clerk for the purpose of being given an identification mark or marks and then do you wish to make a statement about offering such papers?

Mr. Beresford: Yes, your Honor.

The Court: Very well. Is it feasible to mark them all as one exhibit, Mr. Beresford?

Mr. Beresford: It is not, your Honor. They are divided, I believe, into five separate—

The Court: Does that appear obvious to anyone handling them? [15]

Mr. Beresford: Yes, your Honor.

The Court: As to the nature of content, does a similar division of the material suggest itself, and,

if so, on what basis of material content does any division of the material suggest itself?

Mr. Beresford: The entire five are the proceedings below. They are separated, however, and the front sheet of each one contains an indication which I believe would suggest the division into five categories. They are bound together into five different groups by a blue ribbon, as the Court will notice.

The Court: Let each one of those separately blue ribboned bound sections of the material mentioned by Counsel receive from the clerk a proper exhibit identifying mark, as Plaintiffs' Exhibit 1, 2, 3, and so forth.

(Alouette ICC Record was marked Plaintiffs' Exhibit No. 1 for identification.)

The Court: Mr. Bailiff, will you let Counsel on both sides see this part of the material mentioned marked Plaintiffs' Exhibit 1 to see if they can agree upon a statement which Plaintiffs' Counsel or some other Counsel could make which would give it a name which characterizes the content of the exhibit, and that name ought to be in one word or two or three words [16] if that is possible, so that in the future you can call it by that name and everybody knows whether you are referring to Plaintiffs' Exhibit 1 or some other number of plaintiffs' exhibit.

(Acme ICC Record was marked Plaintiffs' Exhibit No. 2 for identification.)

The Court: I ask the bailiff to let Counsel see Plaintiffs' Exhibit 2 for a similar purpose. I ask you to consider suggesting a name first for Plain-

tiffs' Exhibit 1 which reasonably reflects the nature of its contents.

(Ex parte 162 ICC Report and Order was marked Plaintiffs' Exhibit No. 3 for identification.)

The Court: Also Plaintiffs' Exhibit 3 may now be submitted to Counsel.

(Kipp's Peat Tariff X162 and Supplement was marked Plaintiffs' Exhibit No. 4 for identification.)

The Court: Also Plaintiffs' Exhibit 4, I ask you to submit that to Counsel.

(Haynes Peat Tariff #1352 was marked Plaintiffs' Exhibit No. 5 for identification.)

The Court: Plaintiffs' Exhibit 5, I ask you to submit that to Counsel. [17]

(Brief pause.)

The Court: Do Counsel on both sides wish these exhibits to bear a file number of the clerk's office of 3923 or the other number of the companion case, or do they wish each and all of these exhibits to bear the clerk's file number of both cases? Mr. Beresford?

Mr. Beresford: I would suggest both cases, your Honor.

The Court: Is there any objection to that, Counsel?

Mr. Tjossem: No, I concur in that, your Honor. They should be filed in both cases.

The Court: Very well. I ask the clerk in case of every exhibit marked by the clerk with an identifying mark on his records that the exhibit bear both

clerk's file numbers just mentioned. Now would Counsel for the plaintiffs take up each one of these marked exhibits 1 to 5 inclusive and give each one a name, what he would term and believe honestly reflects the nature of the information contained in it, or something to give it a characterization different from every other one of the exhibits. Mr. Beresford?

Mr. Beresford: Your Honor, for No. 1 I would suggest "The Alouette Record". For No. 2—— [18]

The Court: Plaintiffs' Exhibit 1, "Alouette Record", is that right?

Mr. Beresford: Yes, your Honor.

The Court: Record where?

Mr. Beresford: I didn't——

The Court: Record where, where made, where created?

Mr. Beresford: Before the Interstate Commerce Commission.

The Court: The initials "ICC Record", "Alouette ICC Record" would be——

Mr. Beresford: Yes, your Honor.

The Court: Very well. The next one?

Mr. Beresford: "The Acme ICC Record."

The Court: The next one?

Mr. Beresford: "Ex parte 162".

The Court: That is No. 3?

Mr. Beresford: Yes, your Honor.

The Court: Ex parte with reference to what tribunal or proceeding or what?

Mr. Beresford: ICC, your Honor.

The Court: Ex parte ICC what?

Mr. Beresford: No. 162.

The Court: No, no, I mean what did you call it? Oh, just by the number? [19]

Mr. Beresford: Yes, your Honor.

Mr. Tjossem: I think it would be clearer, your Honor, if we would add the words "Report and Order".

The Court: "Ex parte ICC Report and Order"?

Mr. Tjossem: Yes, "ICC ex parte 162 Report and Order", and that would clearly identify it.

The Court: "Ex parte", what is the number?

Mr. Tjossem: 162.

The Court: "Ex parte 162 ICC Report and Order"?

Mr. Tjossem: Yes.

The Court: That will be the name of it. The next one?

Mr. Beresford: "Kipp's Tariff" is No. 4, your Honor.

The Court: K—i what?

Mr. Beresford: K-i-p-p's, your Honor.

The Court: Tariff number what, or does it have a number?

Mr. Beresford: It would be No. 162.

The Court: Look at the title of it on the paper and also look at the contents and then will you repeat what name it is you wish to suggest for it? You used the word "Kipp's" a moment ago. I do not know [20] whether you still wish to favor that or choose something else.

Mr. Beresford: Your Honor, in its entirety it is "Tariff No. X162".

The Court: Does it have an author who is well known to shippers and railroad people?

Mr. Beresford: Yes. Mr. Kipp.

The Court: K-i-p-p?

Mr. Beresford: Yes, K-i-p-p.

The Court: Does this tariff relate to some commodity that is of interest in this litigation?

Mr. Beresford: It relates to the peat, your Honor, that is the subject of this litigation.

The Court: Kipp's Tariff?

Mr. Beresford: Well, Kipp's Tariff No. 162 and Supplement.

The Court: Kipp's P-e-a-t Tariff No. X162 and Supplement. Does that seem to be accurate?

Mr. Beresford: Yes, your Honor, that would denominate it.

The Court: Then the next one? There is at least one more.

Mr. Beresford: This would be Haynes, H-a-y-n-e-s, Tariff No. 1352.

The Court: 1352. Is it Haynes Peat Tariff? [21]

Mr. Beresford: I didn't hear you, your Honor.

The Court: Is it Haynes Peat Tariff, or does it relate to some commodity other than peat of which this case will take an interest?

Mr. Beresford: No, it's only peat, your Honor.

The Court: H-a-y-n-e's Peat——

Mr. Beresford: There is no apostrophe, your Honor. Haynes is his name.

The Court: How do you spell it?

Mr. Beresford: H-a-y-n-e-s, without the apostrophe.

The Court: Very well. Haynes Peat Tariff No.—

Mr. Beresford: 1352.

The Court: Anything else?

Mr. Beresford: That's all, your Honor.

The Court: Do you offer each one of these Plaintiffs' Exhibits 1 to 5, inclusive?

Mr. Beresford: As an identified record or a certified record of the proceedings before the Interstate Commerce Commission.

The Court: Any objection to the offer?

Mr. Tjossem: I have no objection to the offer except that I do want to say this, your Honor, [22] that Exhibits 3, 4 and 5 do not constitute part of the record before the Interstate Commerce Commission in either the Alouette or Acme Peat cases.

The Court: Do you have any objection to the offer in evidence?

Mr. Tjossem: I have no objection to the offer in evidence.

The Court: Each one of these exhibits is now admitted.

(Plaintiffs' Exhibits Nos. 1, 2, 3, 4 and 5 for identification were admitted in evidence.)

[See Exhibit 2 at pages 147-406, Exhibit 4 at pages 407-411.]

The Court: You may proceed with introduction of further evidence, if you have any to offer.

Mr. Beresford: The plaintiffs rest, your Honor.

The Court: Each and all the defendants may now proceed with their case in chief. By "defendants" the Court means each and every kind of de-

defendant by every name and description and every party opposed to the plaintiffs' action in these two consolidated cases.

Mr. Roberts: Speaking for the defendant United States of America, your Honor, pursuant to the answer filed by the United States, we take a neutral position pursuant to the provisions of Title 28, [23] Section 2323, and tender the defense specifically to the Interstate Commerce Commission.

Speaking now for the Interstate Commerce Commission, the defense of this action is now tendered to the intervening railroads.

Mr. Tjossem: Speaking on behalf of all the intervening railroad defendants, we have no proof to offer in this record and again request the right to reserve our opening statement until the time of our opening argument.

The Court: The Court will have to consider it waived because then what we will hear will be argument. You will not need any opening statement.

Mr. Tjossem: Yes, your Honor.

The Court: The defendants then waive their opening statement. As I understand it, all the defendants rest now. Is that right?

Mr. Tjossem: That is correct, your Honor.

The Court: Now the Court understands we have reached the time when it would be proper for Counsel to begin their arguments on the merits in these cases. From now on until the Court's decision is announced does anyone wish the court reporter present for any reason whatsoever?

Mr. Beresford: The plaintiffs do not, your [24] Honor.

Mr. Tjossem: The railroads do not.

Mr. Roberts: The United States and the Interstate Commerce Commission do not, your Honor.

The Court: Very well. The reporter is excused. We will take a very short recess, about three or four minutes, after which we will proceed with the arguments. Court is so recessed.

(Thereupon, oral argument was presented to the Court by respective Counsel. At 12:00 o'clock Noon a recess was taken until 2:00 o'clock p.m.)

Tuesday, June 12, 1956

2:00 o'clock p.m.

(All parties present as before.)

(Further oral argument was presented to the Court by respective Counsel. At 4:00 o'clock p.m., a recess was taken until 10:00 o'clock a.m., Wednesday, June 13, 1956.) [25]

Wednesday, June 13, 1956. 10:00 o'clock a.m.

(All parties present as before.)

(Further oral argument was presented to the Court by respective Counsel, after which the following occurred:)

Mr. Beresford: Your Honor, may I ask for the privilege of opening up my case in chief for the purpose of introducing an exhibit?

The Court: The Court understands that plaintiffs' Counsel asks that plaintiffs' case in chief be opened for further proof.

The Clerk: It will be marked Plaintiffs' Exhibit No. 6.

The Court: Just a minute. Is there any objection to this request?

Mr. Tjossem: I think it's a little late in the day for him to be reopening his case now, Your Honor.

The Court: Would it be any prejudice, do you think, Mr. Tjossem?

Mr. Tjossem: I don't know the nature of the proof that is being offered.

The Court: You may take the time, Mr. Beresford, to explain it to opposing Counsel.

Mr. Beresford: I have just given Counsel a [26] copy of the exhibit.

Mr. Tjossem: I see a sheet before me with some figures on it and some names on it, but I wish Counsel would explain what it purports to be.

The Court: Just take the time to consult with him and explain it to him, Mr. Beresford, so he may understand what it is.

(Brief pause.)

Mr. Tjossem: Counsel explains to me, Your Honor, that this is a computation showing certain mathematical totals, and I'm not in a position to pass on the accuracy of it. I might state this: On freight charges in the railroad our auditors handle that problem and I'm not prepared and I don't feel I have the authority to state for all of the railroads that we can accept these computations as being an accurate audit of the charges as they are purported to be shown. We would feel that we should have the opportunity of auditing the state-

ment the same as we always do before we concede that any calculation by some other party is the correct amount of any charge.

The Court: Do you or do you not object to the request to open up the plaintiffs' case in chief for the purpose of introducing that exhibit?

Mr. Tjossem: I do object, on the grounds [27] that we have not had sufficient notice or an opportunity to verify the accuracy of the information.

The Court: Let the record show what it is you want to offer, and then the Court will have to sustain the objection. Let it be marked by the clerk as plaintiffs' next exhibit.

The Clerk: 6, Your Honor.

The Court: Plaintiffs' Exhibit 6.

(A paper containing computations was marked Plaintiffs' Exhibit No. 6 for identification.)

Mr. Beresford: Should I make my offer?

The Court: The Court is required, I think, to sustain the objection to the request of the plaintiffs to open up the plaintiffs' case in chief, and it is sustained. Now you may make your record, Mr. Beresford, as to what you want to do in so opening, and you may refer to what it was you wished to do.

Mr. Beresford: Your Honor, in making my offer of proof I wish to open up the case and offer to prove by this exhibit a computation of the various totals of the overcharges that we contend were made in this case. The computation, which I would have no objection to being subject to mathematical check-

ing by Counsel, is simply a total of the figures which are already in evidence in this file and in this case, the [28] total of the figures found under the Rule 100 proceeding, the number of which I have already referred to this Court just a few moments ago.

There are three columns on this exhibit. The first column is the total taken from the Rule 100 order, the Rule 100 order showing on its face that the six cent maximum was allowed and the 20 per cent was disallowed in arriving at that total.

I have then caused to be prepared Column 2 of this exhibit, which gives the total additional overcharge if the six per cent per hundredweight is not allowed, or six cents per hundredweight was disallowed.

Then Column 3 is merely a total of Columns 1 and 2 showing the total amount of the overcharge if the entire rate, both the six cent maximum and the 20 per cent, is held to be void and based upon the old base rates.

The Court: I would say for the information of offering Counsel that the plaintiffs have no absolute right to introduce a computation made by them for the convenience of the plaintiffs or for the convenience of the Court. Sometimes and many times in many different actions before the Court computations and analyses and studies and reports made up for the purpose of [29] accommodating witnesses and Counsel and the Court are received in evidence. The burden is upon Counsel to get his proof in, and if he cannot compose the differences between him

and opposing Counsel regarding this computation, why then I say in concluding that there is no absolute right to have it in. I would have supposed that both sides would have wanted something concrete, but I cannot determine that for Counsel. That is a privilege certainly each Counsel has to prove or disapprove as a matter of right. The ruling of the Court might be different if it pertained to something as to which the plaintiffs had an absolute right.

Mr. Tjossem: Could I address the Court again on this subject?

The Court: Yes.

Mr. Tjossem: I would just like to say this, Your Honor: I would like to accommodate Counsel if I could in having such a statement before the Court, but what they have done here for the first time, and this is the first I have seen of it, is to go back and take a whole series of rates applying to various routes throughout the United States and make a computation on what they say that rate should have been and apply that against hundreds of shipments and come up with what they say the answer is, and I am not in a position [30] and I feel in all fairness to my clients I cannot accept their computation as being correct in that respect, and I regret that I didn't——

The Court: The objections to the request of plaintiffs to open up their case in chief for that purpose are sustained.

(Plaintiffs' Exhibit No. 6 for identification was refused.)

The Court: You may proceed with further argument.

(Mr. Beresford presented further oral argument to the Court.)

The Court: In these two actions, from a preponderance of the evidence the Court finds, concludes and decides as follows:

That the action is one for reparations and in particular for the amount of overcharges exacted from the plaintiffs by the defendant railroads.

That this Court does have jurisdiction to hear and determine this action.

That the alleged overcharges and exactions by defendant railroads of plaintiffs were under the pretended authority of a void increase in freight rates for Canadian peat.

That the rates illegally applied by the [31] defendant railroads to those shipments were without authority of law because, to the extent of the rate excess over and above the previously valid rates, such rates were not authorized by law because not promulgated in the manner provided by law nor in the manner specified and expressly conditioned by the Interstate Commerce Commission.

That defendant railroads have no right in law or in equity to keep such overcharges, and are legally bound to repay them to the plaintiffs.

That this record does show the extent of the illegal exactions and alleged damages in detail in Plaintiffs' Exhibit 2 at a place marked by a white tab labeled "Plaintiffs' Interstate Commerce Commission Exhibits" and in particular ICC Exhibit

No. 3, beginning on the first sheet of that exhibit and extending through the succeeding four pages, which show the number of carloads shipped from British Columbia to the various points of destination and show the rate charged on account of the shipment under the illegally exacted rates.

That the rates which had previously been approved and were in effect immediately before the initiation of the proceedings by the defendant railroads for the purpose of obtaining an increase in the rates [32] were the legal rates applicable to these shipments here in question at the time they were made, and that all rates applied to plaintiffs' shipments and all sums of money exacted from plaintiffs by applying such freight rates to the extent of the excess of such rates over said prior existing approved rates are and were illegal and void and without legal right, and the plaintiffs have the right in this action to recover from defendant railroads all such illegally exacted and collected sums.

That the foregoing applies to both Cause No. 3923, entitled Alouette Peat Products, Ltd., plaintiff, and to Cause No. 3924, entitled Acme Peat Products, Ltd., et al, plaintiffs, each of said causes being against the United States of America, et al, and that in each of said causes the material allegations of plaintiffs' complaint are sustained by the facts disclosed by the record in this case, and plaintiffs in each case are entitled to judgment against the defendants as prayed for in their respective complaints, and that plaintiffs are entitled to their costs in this action against the defendant railroads.

I would like to fix a time for settling the findings of fact, conclusions of law and judgment in each of these two cases, and at that time I ask plaintiffs' Counsel to finally present a correct [33] summarized computation of each and all of those items mentioned by the Court and previously dealt with in argument, namely, which may be found on that ICC Exhibit No. 3, being a part of Plaintiffs' Exhibit 2 and being indicated in that exhibit file by a white tab labeled "Plaintiffs' ICC Exhibits" etc. I wish plaintiffs' Counsel to cooperate with defendants' Counsel in respect to the accuracy of that computation and summary and to try in a proper way to get the approval of defendants' Counsel respecting the accuracy and propriety of that being used by the Court for the determination of the exact amount in dollars and cents of the judgment in each case to be awarded to the plaintiffs against the defendants. If you cannot by that time, which the Court will now fix for settling the judgment, obtain defendants' Counsel's approval of that statement for use by the Court, then I say to Counsel on both sides that the Court will require plaintiffs to offer proof upon the total amounts of the dollars and cents to be recovered in each of the two cases by way of computation and summarization of the facts shown or indicated on those pages in less practical form and detail. If it is required to take proof, the Court will proceed to do so at that time. In the absence of agreement plaintiffs' Counsel will [34] be required to offer oral or other proof at that time or run the risk of the Court entering a different

judgment than that indicated here. Defendants' Counsel will be permitted, in case oral testimony is taken of plaintiffs' witnesses on this summarization and computation, to introduce further proof in rebuttal of any additional proof which may be offered by plaintiffs. But the Court will take no proof if Counsel are able to agree on a proper summarization of the computations of those detailed figures.

Does anyone know of any issue tendered by any one of the complaints or any one of the answers in either one of these actions which has not been determined by the Court's orally announced decision? (No response.)

I wish to do this further work at the earliest possible date. This case is continued until Monday afternoon, the 18th day of June, at two o'clock, that being this coming Monday, for the purposes mentioned. Also I ask of plaintiffs' Counsel to immediately prepare and as soon as possible serve upon defendants' Counsel proposed findings of fact, conclusions of law and judgment.

Court is now recessed until two o'clock this afternoon and those connected with this case—— [35]

Mr. Beresford: Might I ask the Court a question?

The Court: Those connected with this case will be excused until two o'clock this coming Monday. Yes.

Mr. Beresford: One question I would like to ask the Court. Since there are such a multitude of mathematical computations, just for the matter of verifying them could we have a day or two more?

The Court: No. By reason of future calendar

matters, the Court must do it Monday afternoon. Let's proceed to do it by that time. I think both Counsel can do it by that time. I want to finish this case and turn to something else.

Court is so recessed and those connected with this case are excused.

(Thereupon, at 12:00 o'clock Noon, a recess herein was taken until 2:00 o'clock p.m., Monday, June 18, 1956.) [36]

Monday, June 18, 1956. 3:10 p.m. o'clock p.m.

(All parties present as before. In addition, Mr. Fred H. Tolan, Attorney at Law, appeared with Mr. Beresford and Miss Locke in behalf of plaintiffs.)

The Court: At this time I wish to take up the Alouette and Acme matters. I wish to take up the matter of settling the proper forms of findings of fact, conclusions of law and judgments. You may proceed.

(Some papers were handed to the Court by Mr. Beresford.)

The Court: What comment, Mr. Beresford, do you wish to make about whether or not these are true and correct findings in accordance with the Court's orally announced decision?

Mr. Beresford: Your Honor, we have had the Court's oral opinion typed. To the best of our knowledge these are true and correct findings. I think that Mr. Tjossem and myself are in agreement as to the amounts. Mr. Tjossem will express himself on that point. Mr. Roberts, however, has a suggested cor-

rection in the preamble, to which we have no objection. We just were unable to get together until today on that suggested correction. [37]

The Court: What is the suggestion?

Mr. Roberts: Yes, Your Honor, and I believe all parties are agreed to it. On Page 2 of the findings, Your Honor please, commencing on my copies with Lines 2, 3 and 4, I have some suggested changes in the nature of describing my participation as Counsel both for the United States of America and appearing for the Interstate Commerce Commission.

The first interlineation would appear on Line 2 of Page 2 after the words "United States of America", and because it is somewhat lengthy I would suggest that the interlineation be made on the heading of the page. Following the words "United States of America" I suggest these words: "having, by its answer filed herein, taken a neutral position in this controversy".

The Court: Is there any objection to that?

Mr. Tjossem: No objection, Your Honor.

Mr. Beresford: No objection, Your Honor.

The Court: Where should that be inserted?

Mr. Roberts: That should be inserted, Your Honor, on Line 2 after the words "United States of America".

The Court: You represent the intervening defendant Commission, do you not? [38]

Mr. Roberts: I do, Your Honor, and I will make other changes to show that relation.

The Court: I asked that question of Mr. Tjossem.

I assume the answer by him is "No". Is that right?

Mr. Tjossem: That is right, the answer is no, I do not.

The Court: But Mr. Roberts also represents the Interstate Commerce Commission in the same manner?

Mr. Roberts: That is correct, Your Honor.

The Court: Why not have this insertion after—

Mr. Roberts: Because, Your Honor, the interests of the defendant United States of America are different from those of the ICC.

The Court: All right. After "United States of America", is that where you want to make this insertion?

Mr. Roberts: That is correct, Your Honor.

The Court: What are the order and how many are there of them?

Mr. Roberts: I will read the words. "having, by its answer filed herein, taken a neutral position in this controversy".

The Court: I always find some way of [39] getting interlineations physically inserted, and I will undertake it now. "h-a-v-i-n-g", and what is the next?

Mr. Roberts: Comma, "by its answer filed herein, taken a neutral position in this controversy".

The Court: Taken what?

Mr. Roberts: "a neutral position in this controversy".

The Court: Why not "in this action"?

Mr. Roberts: "in this action" would be most proper, Your Honor.

The Court: Comma after "action"?

Mr. Roberts: Yes, if Your Honor please.

The Court: Then where is the next insertion?

Mr. Roberts: The next insertion is on Line 3 after the words "Interstate Commerce Commission" delete the comma, then the word "having" and after the word "having" these words inserted:—

The Court: You wish to delete the word "having" or keep that word?

Mr. Roberts: No, Your Honor, delete the comma before and after the word "having" and insert these words—

The Court: After "having"?

Mr. Roberts: After "having," "submitted their case on written brief and having". [40]

The Court: By "their" you mean "its," the Interstate Commerce Commission, do you not?

Mr. Roberts: Yes. I used the plural form because it had been used in the typewritten form, your Honor.

The Court: "submitted their" what?

Mr. Roberts: "their case on written brief and having."

The Court: B-r-i-e-f?

Mr. Roberts: Yes, your Honor, singular.

The Court: "and having" what, comma?

Mr. Robert: "and having," then we continue with the script, the typewriting. The last change is on Line 4 after the words "tendered in open court" striking the two following words "the defense" and inserting in their place "oral argument." So that

it would read, "tendered in open court oral argument."

The Court: That is all, is it?

Mr. Roberts: There is one other comparable change, your Honor, in the judgment as entered by the Court. Turning now to Page 1 of the judgment and the last typewritten line on that page, Line 32.

The Court: Page 1?

Mr. Roberts: That would be Page 1 of the judgment, Line 32, after the words "States of America" [41] insert these words: "having taken a neutral position in this action."

The Court: What else? A comma after "action?"

Mr. Roberts: Yes, your Honor. Then on Page 2 of the judgment on Line 1 thereof after the words "Commerce Commission" insert these words—

The Court: After "Commission." You inserted it after "having" before, did you not?

Mr. Roberts: I was going to say just after the word "Commission" striking the comma and inserting these words: "having submitted their case on written brief and." And then on the next line down after the words "tendered in open court" the two following words "the defense" are stricken and the words "oral argument" substituted for them.

The Court: Very well. Anything else?

Mr. Roberts: There are no other changes, if your Honor please, and all of these I believe are agreed to by all parties.

The Court: Any objection on anyone's part?

Mr. Beresford: No, your Honor.

Mr. Tjossem: No, your Honor.

Mr. Roberts: May I further address the Court? Unfortunately in weighing the time, your Honor, I had set appointments for two o'clock for this afternoon [42] earlier last week and I have continued them until 3:00. I have six witnesses to interview. I believe that my participation here is sufficient when I state for the record the position of the Interstate Commerce Commission to these findings, conclusions and judgment, and that is that the Interstate Commerce Commission respectfully takes exception to the Court's entering same. With that statement for the record I pray that the Court excuse me from further attendance at this time.

The Court: Any objection to excusing him?

Mr. Beresford: None, your Honor.

Mr. Tjossem: No objection, your Honor.

The Court: You may be excused, and the Court notes in the record that exception at this time, to take effect as and of the time when the findings, conclusions and judgment may be entered.

Mr. Roberts: Thank you, your Honor.

(Mr. Roberts left the courtroom.)

The Court: Mr. Beresford, is there anything you wish to say in behalf of the—did you intend to be understood by the Court as saying that Mr. Tjossem representing the railroads and yourself representing the plaintiffs have agreed that these calculations are accurate? [43]

Mr. Beresford: Your Honor, as I understand it, these calculations have been taken from the order

of the Interstate Commerce Commission which is in the file and we have agreed that the computation is correct. Is that correct?

Mr. Tjossem: Well, I would like to restate that if I may, your Honor. I have agreed with Counsel that I would stipulate that he has in determining the amounts taken the amounts as shown by Interstate Commerce Commission Rule 100 statement, has multiplied the weight of each shipment as used for the purpose of determining the freight charges by six cents per hundred pounds; that this method would add to the reparations there shown to be due the amount of the additional reparation allowed by the Court, and that his computation was done in an accurate manner. I will so stipulate.

The Court: Will you also stipulate that the Court may use those calculations with like effect as if Mr. Beresford or some other witness had during the trial orally testified and orally stated they were correct calculations?

Mr. Tjossem: Could I reserve my statement on that until I make my objection? I think it will become apparent to your Honor why I feel I should. If [44] I can state my—I have one principal objection, your Honor.

The Court: Yes, you may.

Mr. Tjossem: To the form of the findings, conclusions and judgments, and I think when I state that it will become apparent to your Honor wherein I have my difficulty.

Let me first say that on behalf of the railroads intervened in this case we do except to the entry

of the findings of fact, conclusions of law and judgments on the grounds that the Court is committing error when it enters, if it enters, a judgment reversing the Commission or awarding damage against any of the railroad intervening defendants.

We have raised these points of law, they have been overruled in your Honor's rulings on the motion and in the ruling on the merits and we will not repeat our argument here. I simply want it to be shown in the record that we still object and do except on that basis.

Now turning to the main ground of my objections to the presently proposed findings of fact, conclusions of law and judgments, I would point out to the Court that I appeared in this action as Counsel for the following railroads that sought authority to [45] intervene and were permitted to intervene in this action pursuant to Title 28, Section 2323, to-wit: In Cause No. 3923 I intervened on behalf of and the following railroads were admitted as intervening parties in this suit: The Union Pacific Railroad, the Southern Pacific Company, the Great Northern Railway Company and the Northern Pacific Railway Company. In Cause No. 3924 the following railroads were permitted to intervene as defendants: Chicago, Milwaukee, St. Paul and Pacific Railroad, the Union Pacific Railroad, the Southern Pacific Company, the Great Northern Railway and the Northern Pacific Railway.

Now, while I have some smaller objections, I would like to turn first to my main objection. The

findings of fact, conclusions of law and judgment as tendered to the Court purport to enter a judgment against railroads who are not parties to this action, whom I do not represent, who so far as I know have no knowledge or have never had notice of this proceedings, and since I do not represent them I can't speak for them but I do feel I have the duty to the Court to point out that these parties who I will name are not parties to this suit. I might say that no process so far as I know was ever issued or served on any railroad in this proceeding. [46]

The following railroads have never appeared or otherwise, until this judgment has been tendered, been mentioned in this court proceeding: The Duluth, Winnipeg and Pacific Railway Company, the Minneapolis, St. Paul, Sault Sainte Marie Railroad Company, the New York Central Railroad Company, the Wabash Railroad Company, the Boston and Maine Railroad.

In the findings of fact the Court is asked to find, for example, on Page 7 that there is due the several plaintiffs by the Duluth, Winnipeg and Pacific Railway Company a total of \$11,988.39. The same treatment is given the other railroads which I named, and that is carried over into the judgment where it is provided in Paragraph IV on Pages 4 and 5 that a judgment be entered against the Duluth, Winnipeg and Pacific Railroad Company in the amount of \$11,988.39, the Minneapolis, St. Paul, Sault Sainte Marie Railroad Company in the amount of \$17,034.18, the New York Central Rail-

road Company in the sum of \$1,641.67, the Wabash Railroad in the amount of \$8,179, the Boston and Maine Railroad \$11,114. Then again the Minneapolis, St. Paul, Sault Sainte Marie Railroad Company \$2,224.98.

Now, of the carriers that I represent here as intervening defendants, there are only two named in the proposed findings and judgment that intervened [47] in this case at all; that is the Northern Pacific and the Great Northern. As to those two railroads I would say this: The action as stated in the complaint was brought pursuant to Section 28 U. S. C. A. Section 1336, and that is the section that authorizes actions to review an order of the Interstate Commerce Commission. That same section is carried forward into the proposed findings in Paragraph I and as stated in the proposed Finding II on Page 2, "That this action is brought for the purpose of having this Court review the decision and orders of the Interstate Commerce Commission, as more particularly hereinafter set forth."

When an action is brought to review an order of the Interstate Commerce Commission pursuant to Section 28 U. S. C. A. Section 1336 the parties before the Commission as a matter of right have a right to intervene. Our petitions in intervention show that we intervened under Title 18, Section 2323, in support of the Commission's order, that the appearance by the intervening defendants in this cause does not furnish an adequate jurisdictional basis for this Court to now enter a personal monetary judgment against any of the intervening

defendants. Now, that is the main objection that I have.

The Court: This certainly is a rather late [48] day in the litigation to raise that objection. That should have been raised before trial. I understood you represented these western railroads, especially the three of them, Mr. Tjossem, the Great Northern, the Northern Pacific and the Milwaukee.

Mr. Tjossem: I have stated to the Court that I do represent them, but the point I am making to the Court——

The Court: Do you represent the Union Pacific?

Mr. Tjossem: I am an attorney employed by the Great Northern Railway Company. When this suit was brought I wrote to the Southern Pacific, the Union Pacific, the Milwaukee and the Northern Pacific and asked them if they wanted to appear or if they wanted to authorize me to appear for them. They have written to me saying that I might appear. That is the only representation I have made to this Court. The petitions in intervention are limited to those companies. I have never been in correspondence with nor do I know anything about these other companies who have now been brought into this case for the first time by this proposed findings of fact, conclusions of law and judgment. I can't speak for them, I have no authority to speak for them, I don't represent them. I pointed this out [49] because I feel I owe a duty to this Court to point out the limits of its jurisdiction.

The Court: Do you have any objection to any

item here calculated to be due as not due by any of these carrying intervening defendant railroads?

Mr. Tjossem: I'm sorry, I didn't follow that, your Honor.

The Court: Mr. Reporter, will you read it.

(The reporter read the Court's question.)

Mr. Tjossem: I am unable in the shortness of time to ascertain whether the amount stated for the individual intervening railroads is correct. I have agreed to stipulate and I will stipulate that they have taken the Rule 100 statement, have multiplied the weight shown in there of each shipment by six cents per hundred pounds, and that that calculation will in total add to the total award of reparations the amount that this Court would allow in addition to what the Commission allowed in that statement, and beyond that I cannot stipulate.

The Court: Have you any objection to the identity of the suing plaintiffs mentioned in the findings?

Mr. Tjossem: I have no objection to that. I do have, in addition to the general objection which [50] I have stated, an objection to one word in Finding No. 6 on Page 5, in Line 19 I believe it is. That sentence reads, "That the publication of the tariffs herein referred to were made on a 5-day shortened period of publication pursuant to Ex Parte 162, which order directed authorized increases to be made on said 5-day notice." I object to the use of the word "directed." The order was permissive, and I would suggest the substitution of the

words "which order permitted authorized increases to be made."

The Court: Have you any objection to that?

Mr. Beresford: No, your Honor.

The Court: Will it have any effect on whether or not he is entitled to recover against the railroads who participated in that permission?

Mr. Tjossem: No, it doesn't. It's just——

The Court: Then in Line 19 strike the word "directed" and insert in lieu thereof the word "permitted?"

Mr. Tjossem: "Permitted" is right, your Honor. Now for the record I would like to also except to the conclusion of law No. 3 wherein it is stated, "That where shipments of peat, as set forth in Finding X hereinbefore, have been carried over a route involving more than one carrier, said carriers are jointly and [51] severally liable for the refund of the excess charges thus illegally exacted." for the reason that the rule of law there stated applies only where the carriers are guilty of a tortious act, and it is my position and I understand the Court's decision here that we have charged rates which were above the level of rates which the Court has found to be legally applicable, and if that is the ruling of the Court our action in so charging those rates is a matter of breach of contract, not of tort liability, and that there is no joint or several damage; that the damage is individually to the carrier in so far as it participated in a movement and to the extent it did collect the charges which the Court found was in excess of the lawful rate.

The Court: I would like to hear your response to this objection, Mr. Beresford, to Conclusion No. 3.

Mr. Beresford: Yes, your Honor. The case in point is *Lewis-Simas-Jones Co. vs. Southern Pacific Co.*, which is found in 283 U. S. at Page 654.

Mr. Tjossem: Is that 283, Counsel?

Mr. Beresford: 283 U. S. 654. Reading from Page 660, "The Act prohibits every excessive charge, whether exacted directly or obtained by indirection, and its provisions are designed to prevent the evasion of the rule that every charge for transportation shall [52] be just and reasonable. The collection by a common carrier of exorbitant charges is a tort." Citing cases. "The general rule as to liability of joint tort-feasors applies where two or more connecting carriers combine to impose excessive charges for transportation over their connecting lines." Citing cases. "Defendant is liable for any violation of the Act by it that caused or contributed to cause damage to plaintiff without regard to the proportion of the charges attributable to foreign transportation or paid to the foreign carrier."

The Court: That is sufficient. I cannot take up so much time.

Mr. Beresford: Well, that's right in point on it, your Honor. It expressly holds——

The Court: What year was that decided?

Mr. Beresford: That is 1930. There has been no change since then.

The Court: Now, Mr. Tjossem, was there any-

thing else about the findings and conclusions you wish to state?

Mr. Tjossem: No, that completes my statement.

The Court: Very well. Then I wish to hear from Mr. Beresford about this very important point raised about those not served and that those who [53] especially authorized Counsel to appear by intervention are in effect the only railroads suable in this action.

Mr. Beresford: Your Honor, the situation there is, first, the facts of this case show that Mr. Tjossem appeared for all of these railroads.

The Court: Where are the facts?

Mr. Beresford: That's in Exhibit 2. If I may have it I will—I'm making the point to begin with that Mr. Tjossem before the Interstate Commerce Commission appeared for all of the railroads involved here, not only those—that's a preliminary point, your Honor. I'll show that in the evidence. May I pass on to save time?

The Court: Yes.

Mr. Beresford: That is to be found in Exhibit 2, Document 3, which is the transcript of the proceedings in the Acme Peat case, wherein Mr. Tjossem appears officially for all defendants.

The Court: All those named in this action?

Mr. Beresford: All those named in this action, and the complaint, which is Document 1 of Exhibit 2——

The Court: Which complaint in which court?

Mr. Beresford: The complaint before the [54] Interstate Commerce Commission, lists all the rail-

roads that Mr. Tjossem appeared for before the Interstate Commerce Commission, which are all the railroads named here. Then this is an appeal from that proceedings, your Honor, where there was a full appearance there by Mr. Tjossem. Then the statute expressly provides, this is Title 28 U.S.C.A. Section 2322, that the action is to be brought against the United States, which we did. That's why the named plaintiff here is the United States. Any railroad that desires may intervene.

The Court: Did you correctly state your mind? You said that is why the plaintiff is the United States.

Mr. Beresford: I beg your pardon. Did I say the plaintiff?

The Court: Yes.

Mr. Beresford: I meant the defendant.

The Court: "The reason why the defendant is the United States."

Mr. Beresford: Then any railroad that desires may intervene. All parties have notice because it is an appeal from a proceeding in which they all appeared before the Interstate Commerce Commission. This Court under that section has jurisdiction over all of the parties. Now, it makes no difference what—— [55]

The Court: Read where the Court is given jurisdiction in this review proceedings over all of those who appeared before the Commission.

Mr. Beresford: Your Honor, I thought I brought that volume of the United States Code with me.

Maybe we have it written down in longhand. Do you have it?

Mr. Tjossem: I have the applicable section here (handing book to Mr. Beresford).

Mr. Beresford: Title 28, your Honor, commencing with Section 2321:

"The procedure in the district courts in actions to enforce, suspend, enjoin, annul or set aside in whole or in part any order of the Interstate Commerce Commission other than for the payment of money or the collection of fines, penalties and forfeitures, shall be as provided in this chapter."

This is the old volume. Is this up to date? Ex-me, Mr. Tjossem.

Mr. Tjossem: I believe it is.

The Court: What section is it that you wish?

Mr. Beresford: 2321 and sequel, your Honor.

The Court: Of what volume?

Mr. Beresford: Title 28. [56]

(A book was handed to Mr. Beresford.)

Mr. Beresford: Your Honor, I'm now reading from Section 2321:

"Procedure generally; process

"The procedure in the district courts in actions to enforce, suspend, enjoin, annul or set aside in whole or in part any order of the Interstate Commerce Commission other than for the payment of money or the collection of fines, penalties and forfeitures, shall be as provided in this chapter.

"The orders, writs, and process of the district courts may, in the cases specified in this section and

in the cases and proceedings under sections 20, 23, and 43 of Title 49, run, be served, and be returnable anywhere in the United States.”

2323: “The Attorney General shall represent the Government in the actions specified in section 2321 of this title and in actions under sections 20, 23, and 43 of Title 49, in the district courts, and in the Supreme Court of the United States upon appeal from the district courts.

“The Interstate Commerce Commission and [57] any party or parties in interest to the proceeding before the Commission, in which an order or requirement is made, may appear as parties of their own motion and as of right, and be represented by their counsel, in any action involving the validity of such order or requirement or any part thereof, and the interest of such party.”

Now, that in its essence is the way this action is brought. If the other railroads desire to intervene——

The Court: Read the particular provisions of the statute which you interpret to mean the proceeding here is one of a review or appeal and not a new action.

Mr. Beresford: Your Honor, this case of United States vs. Interstate Commerce Commission which I read to you the other day, not thinking this point was coming up we didn't bring it again. That's the one in 93 Law Edition which confers jurisdiction on this Court for such an appeal in interpreting this statute, and this statute provides——

The Court: There must have been some other

case where a point similar to this has been raised where some party appearing before the Commission did [58] not appear in the District Court and contended that he was not before the District Court. There must be some such case.

Mr. Beresford: There is one case right here I see in the annotations. "A provision authorizing intervention by the United States. The United States under the provisions of this section is a necessary and indispensable original party, and hence intervention is unnecessary." That's the *Lamberton Coal Company vs. Baltimore and Ohio Railroad*.

The Court: I want a decision that says that the appearance originally before the Commission continues to be such during the review proceedings before this Court. That is very plain.

Mr. Beresford: Your Honor, the statute provides that they are not necessary parties. I perhaps am not making my point clear. The only party under the amended statute is the United States. The statute expressly provides——

The Court: Do you mean before the Commission or in this court?

Mr. Beresford: On the appeal. The only necessary party is the United States. The statute that I read to you covers the option upon the railroads that were parties to the proceeding before the Commission. [59]

The Court: Read the statutory words that give this Court jurisdiction to do anything with respect to those proceedings before the Commission.

Mr. Beresford: I'm reading Chapter 157. "Interstate Commerce Commission orders; enforcement and review" is the chapter head. And then the procedure generally—the statute that gives the power—I have been reading because Counsel raised the point on the procedure. The statute that gives the power, which is the statute that I read to the Court the other day, is 49 United States Code, Section——

The Court: Will Miss Locke go with the bailiff and get that? This point was not argued the other day, was it, whether or not there are some of these defendants not before this Court? That has not been raised before, has it, during this trial?

Mr. Tjossem: No, your Honor. It was never asserted here to my knowledge that they were trying to reach anyone beyond the United States and to reverse the order of the Commission, and it has not been raised.

I might say, if I may at this time, that we have raised this same point in this way: I think that this difficulty leads you to the jurisdictional question which we did argue on our motion, that the jurisdiction of this Court in this proceeding is limited to considering [60] the lawfulness of the Commission's order and to follow the Commission's order, the jurisdiction is limited to reversing that order and remanding these proceedings back to the Commission for further proceedings consistent with your Honor's opinion, and that is where your jurisdiction ends.

Now, we have argued that in our preliminary

motion, I raised it again in my trial brief, I argued it again to you the other day. I don't want to be repetitious but this I think, your Honor, illustrates the difficulty that arises when the Court tries to extend its jurisdiction beyond a mere review in appellate proceedings and to enter a monetary judgment.

The section which Counsel was reading, if you will notice, Section 2321, applies to orders of the Interstate Commerce Commission other than for the payment of money. If you have an order of the Interstate Commerce Commission for the payment of money, that action is brought pursuant to Section 13 of Title 49.

Mr. Beresford: Your Honor, Section 16 applies where a reparations judgment has been entered by the Interstate Commerce Commission and the railroads have refused to pay it. Then in that event there is a direct suit brought upon that Interstate Commerce [61] Commission judgment in the Federal District Court. This applies to all other proceedings, such as the one which we have brought here.

The gist of Counsel's argument would be this, that this Court should not enter a money judgment, so we would then go back to the Interstate Commerce Commission where there are no further issues of fact to be argued, and then Counsel could do as he stated in his argument here at the time of the trial in chief of this case, he stated what the railroads did do, and that is refuse to pay the reparations order, so that it would be necessary to bring

another action in the District Court to enforce the judgment. That certainly is much beyond—well, it just makes an unnecessary middle step.

I will have the section here. The Court is given jurisdiction. The matter of jurisdiction we called to the Court's attention during the course of the trial. That is Title 28, Section 1336, which provides,

“Except as otherwise provided by act of Congress, the district courts shall have jurisdiction of any civil action to enforce, enjoin, set aside, annul, or suspend in whole or in part any order of the Interstate [62] Commerce Commission.”

Then pursuant to that we read to the Court the case of Interstate Commerce Commission vs. United States, which did——

The Court: I am anxious for you to as soon as possible get to the point in the words of the statute which deal with the nature of this Court's jurisdiction, being a review or being original or being whatever it is.

Mr. Beresford: May I yield to Miss Locke on this point, your Honor?

The Court: Yes, you may.

Miss Locke: We are having the U. S. vs. ICC case brought down, your Honor. That is the case which discusses the particular form of action, and it discusses this as being an appeal rather than——

The Court: Have you a statutory word or provision you can read from a statute that says what the nature of this Court's proceeding is, whether it

is merely by way of review or whether it is some original action?

Miss Locke: The Supreme Court has said that it is a review action rather than an original action and that the procedure should be the procedure in these statutory sections. The statute I don't believe in so [63] many terms would cover it.

The Supreme Court in that case which we read to your Honor the other day and which we will now read again goes on at some length in that under the Interstate Commerce Act, which is 49 U. S. C. A. Section 9, there is provided an election of remedies, and that section provides that persons damaged may either go before the Interstate Commerce Commission or before the courts, and in the leading case in 93 Law Edition it was urged that because the parties had originally gone before the Interstate Commerce Commission they had made an election and could not go before the courts, and the Supreme Court said in answer to that that that section applied only to original actions and not to their right to appeal from the Interstate Commerce Commission to the courts and allowed that sort of action, which is exactly the kind of action we have copied here in coming from the Interstate Commerce Commission to this Court, and the Court definitely states there that the parties should have a right of appeal and says that it does not believe that Congress intended to deny the right of appeal to the parties.

The Court: Where in the findings have you a statement as to who is liable, what railroads?

Mr. Beresford: Paragraph X. [64]

The Court: You have the Great Northern and who else?

Miss Locke: We have taken the——

The Court: You have the Northern Pacific on Page 8.

Miss Locke: Yes, your Honor. On Page 7, Line 1, is the Great Northern, Line 11 the Duluth, Winnipeg and Pacific Railway.

The Court: I want to know, of these others that we are talking about, the local railroads, how many of them are stated?

Miss Locke: On Page 8 is the Northern Pacific, your Honor.

The Court: Does Mr. Tjossem say that he represents and did intend to represent that concern, that defendant?

Miss Locke: Yes, your Honor.

Mr. Tjossem: Yes, I represent the Northern Pacific as an intervening defendant.

The Court: Will you name the others, please, that you do appear for in this particular case expressly?

Mr. Tjossem: Yes, sir. The Great Northern Railway Company, the Northern Pacific Railway Company, the Southern Pacific Company; Chicago, Milwaukee, St. Paul and Pacific, and the Union Pacific Railroad. [65]

The Court: In this case you claim that you did not appear for anybody else, is that right?

Mr. Tjossem: That's right. I agree, your Honor, that I did appear before the Commission as one of

Counsel for all of the defending railroads, but in this court I only appeared for those railroads and I was only authorized to appear for those railroads. I have had no communication with the other railroads whatsoever.

The Court: How many of these calculations are there, if any, as to which these defendants are not liable, these ones last named? In other words, saying it in another way, are the G. N., the N. P., the S. P., the Milwaukee and the U. P. each and all liable for each and all of these items in your calculations, Mr. Beresford?

Mr. Beresford: Your Honor, in answer to your Honor's question, the Great Northern only, looking at Page 7, would be liable for the calculations listed under Great Northern, that there is no liability on the part of the Northern Pacific or other western railroads here. The same would be true in so far as the Northern Pacific is concerned on Page 8. There are, however, places in the calculation where the Milwaukee appears but didn't happen to be the entering railroad [66] so we did not in the interests of uniformity segregate it in that manner, not thinking that this question would come up.

Your Honor, if I could just call to the Court's attention again the fact that the statute makes only——

The Court: I am trying to get you to point out the words in the statute that say that this Court is reviewing and not entertaining original jurisdiction. That is what I am trying to get you to do,

and if you can do that, that will settle all of these questions in the Court's mind.

Mr. Beresford: Well, reading from 1336, I think this answers the question.

The Court: All right.

Mr. Beresford: "Except as otherwise provided by act of Congress, the district courts shall have jurisdiction of any civil action to enforce, enjoin, set aside, annul, or suspend in whole or in part any order of the Interstate Commerce Commission."

The Court: I have never witnessed while I was on the bench and performing the functions of a judge in this court any case where as to a party not appearing in this court in the proceeding immediately before the Court the Court entered a judgment against [67] such absent and nonappearing defendant. I do not recall any instance where the Court has done that, with the possible exception of reviews of commissioners of one kind or another as to which the statute is very specific, but never before do I recall of having brought into question the authority of this Court in any review proceeding or any other kind of proceeding and never heard it seriously asserted before that this Court has authority in the absence of express appearance or general appearance by operation of law by acts of the defendant to enter any judgment against a defendant.

Mr. Beresford: Your Honor, since this court is the appellate court—

The Court: Yes, sir, but will you please keep on—and I cannot say it too often, I wish you to

point me out a statutory word that says what you say is the situation or a statement of the Supreme Court which says it. All you do is to comment by comment without it being backed up by anything. You may proceed.

Miss Locke: If it please the Court, we have now the United States vs. Interstate Commerce Commission which appears at 337 U. S. 426, and I would like to read from that case. In that case at Page 433 it is stated that, "The Commission and the railroads contend [68] that Section 9 of the Interstate Commerce Act bars the United States or any other official from a judicial review of an order denying damages in reparations in proceedings before the Commission." And further down on that page the Court states that, "Under the contention the order is final and not reviewable by any court even though entered arbitrarily without substantial supporting evidence and in defiance of law. Such a sweeping contention for administrative finality is out of harmony with the general legislative pattern of administrative and judicial relationships." And the Court goes on on Page 435 to state, "So we can find nothing in the language of Section 9 that bars the court from reviewing a reparation order upon allegations by a shipper that the order was entered in defiance of standards established by Congress to determine when reparations are due."

The Court: I do not wish to take action upon this. If you think you can find some case holding on an issue like that raised by Mr. Tjossem that the

Court can proceed against those railroads who have not appeared here, then the Court will be at least as well informed as you could inform a Court whose jurisdiction is appellate as far as this Court is concerned. But what you are proposing to do is to ask the Court to [69] take this risk and make this great big leap without showing the Court any express statute word or any express court ruling that those parties, and going further and saying that those persons who appeared in the Commission's proceeding are still before the Court on that judicial review. There are many instances where we have judicial reviews by the court of first instance in which the court of first instance is not given appellate jurisdiction since the Circuit Court of Appeals or the Supreme Court of the United States are given such jurisdiction. That ought to be spelled out in some Act or spelled out in some ruling of some court.

Miss Locke: We feel, your Honor, that this case does——

The Court: But that does not raise the question here stated. That is talking about subject matter, that is not talking about parties.

Miss Locke: Your Honor, the Court——

The Court: That is what you said it was talking about. My remarks refer to what you read in the decision.

Miss Locke: Yes, your Honor. The Court states that, "The Attorney General appears as statutory defendant and states that the Interstate Commerce Act [70] contains adequate provisions for protec-

tion of Commission orders by the Commission and by the railroads when, as here, they are the real parties in interest, for whether the Attorney General defends or not the Commission and the railroads are authorized to interpose all defenses to the government's charges"—the government being the plaintiff,—“and claims that can be interposed to charges and claims of other shippers. In this case the Commission and the railroads have availed themselves of the statutory authorization.”

The Court: That does not hold anything that is on this issue at all, according to my way of looking at it.

Miss Locke: Well, we feel, your Honor, that it is a clear holding that the necessary party defendant is the United States of America and that any parties who wish to intervene on the judicial review have the right to intervene on the judicial review just as in any other appeal, any party can come in as respondent and defend if they wish to defend.

The Court: Where are the statutory words? Did the United States object to the jurisdiction over it because it did not appear? You see, this question is raised directly, it is not raised inferentially, it is raised directly by a person or a party that was [71] before the Commission which says it never has been a party here and therefore is not bound by this Court's judgments and in all other proceedings of first instance. It is true that this Court, like any other Court of first instance, gains no jurisdiction merely by filing in this action. There must be process against the defendant named, and it is

not a process against any absent party not joined. That is the normal situation in this court.

Miss Locke: That's true, your Honor. I was trying to find a wording in this case which says that the action is to be brought against the United States in accordance with the statute.

The Court: You may sit down a moment and see if you can find it.

(Brief pause.)

The Court: Maybe we had better continue this until some other day, until ten o'clock day after tomorrow, and see if you can get something on it. Maybe you can find something on it.

Mr. Beresford: Your Honor,——

The Court: I would like to have a Supreme Court decision or a Circuit Court decision or the word of a statute on it.

Mr. Beresford: Since we didn't anticipate [72] that point, that would give us more chance to advise the Court of the law.

The Court: The matter is continued until——

Mr. Tjossem: If the Court please, I have commitments tomorrow and Wednesday. Could it go over until Thursday?

The Court: No, not if it is the 21st. Will you be free tomorrow?

Mr. Tjossem: Well, I possibly could be free at ten o'clock tomorrow morning.

The Court: How about two o'clock?

Mr. Tjossem: Well, our General Counsel is coming out and he has asked me to sit in on a meeting with all General Counsel meeting here in Seattle

and he has asked me not to have anything arranged for tomorrow or the next day, your Honor.

The Court: I think this is necessary because this court will not be in session in Seattle during the last week in June nor the first two weeks in July, and so this matter is continued until tomorrow afternoon at two o'clock for further proceedings. Let these papers be returned to Counsel.

(Thereupon, at 4:20 o'clock p.m., a recess herein was taken until 2:00 o'clock p.m., Tuesday, June 19, 1956.) [73]

Tuesday, June 19, 1956

2:00 o'clock p.m.

(All parties present as before.)

The Court: I wish to find out what the authority is for the plaintiffs on this issue between the plaintiffs and the railroad intervening defendants about who is before the Court in this review proceeding. What authority do you have?

Mr. Beresford: Your Honor, we now, I'm quite certain, have exhausted the subject. Since this appellate procedure dates only from the Interstate Commerce Commission case and, as expressly stated in the Circuit Court of Appeals case, on the same Interstate Commerce case after it had been reversed, that is the '52 decision rather than the '49 decision, the question was only touched upon and not specifically decided.

There is no authority expressly holding that all of the railroads are before this Court. It was and still is our position that because this is an appeal and

this Court is serving in an appellate capacity, that all the parties that were in the proceedings below are here, but in deference to the—well, we have prepared alternate pages for the conclusions if the Court, because [74] there is no definite authority on the point, feels that it should be remanded, we have corrected the last two pages of the conclusions of law and the judgment to so provide.

The Court: The Court feels under all the circumstances that that is the best way to handle it. Is there any objection to that? And then there will be no amount of damages awarded in favor of the plaintiffs against the defendants at this time.

Mr. Beresford: No, your Honor.

The Court: Will you substitute the pages? You may sit in the chair next to Mr. Tjossem to see if you can find a means of accomplishing the result desired that is agreeable with him. If Miss Locke can be of help, she may do that.

(Brief pause.)

The Court: I would like Mr. Tjossem to have the opportunity of expressly approving or disapproving of the form.

Mr. Tjossem: I have been advised, your Honor, of what is being accomplished, and I would have a few comments after the Court has the documents before him.

The Court: Very well.

Mr. Beresford: Might I add one word of explanation, your Honor. The judgment being a shorter [75] instrument, since I had the time to do it over completely I have in the judgment incorporated the

changes made by Mr. Roberts and agreed to by all parties yesterday.

The Court: Now, Mr. Tjossem, I will hear you.

Mr. Tjossem: If the Court please, the plaintiffs now have substituted revised pages 9 and 10 in the——

The Court: Of the findings and conclusions?

Mr. Tjossem: Of the findings and conclusions of law. Actually it merely substitutes conclusions of law. In so doing the plaintiffs still leave in the findings of fact in Paragraph X in which it asks this——

The Court: On what page?

Mr. Tjossem: Page 6 of the findings of fact. It commences on Page 6, through 7 and 8.

The Court: And you have not agreed to that, is that it?

Mr. Tjossem: No, I have not agreed to anything, your Honor.

The Court: Do you wish the Court to find those facts?

Mr. Beresford: Your Honor, as I understood the stipulation yesterday——

The Court: I did not understand it to be stipulated that these were the facts. He stipulated to [76] something, but it was not clear to me. As I understood his statement yesterday it will be necessary for the Court to hear additional proof on the accuracy of these figures.

Mr. Beresford: In which event, since it is being remanded anyway, I think that that paragraph can

be deleted. May I speak to Mr. Tolan just a moment?

The Court: Yes.

(Brief pause.)

Mr. Beresford: And we would stipulate that Paragraph X may be deleted.

The Court: Will you take out everything that should be taken out, and why don't you confer with Counsel again about it with a view to avoiding useless record statements and useless effort on your part, the part of Counsel on both sides.

(Brief pause—Counsel confer privately.)

Mr. Tjossem: If the Court please, Counsel and I apparently cannot yet agree on the propriety of including Conclusion of Law No. 4 on the second substituted page. It is proposed in that Conclusion No. 4, "That the Interstate Commerce Commission violated its own rules and as a result thereof denied the plaintiffs due process by granting a second petition of the [77] railroads for reconsideration as more particularly set forth in its Order of June 21, 1954."

Counsel stated to me the basis for that conclusion is the Court's statement in its oral decision that the Court found that the plaintiff had proved all of the material allegations of the complaint.

My position is that that is a conclusion of law and that the Court in ruling did not rule that the Interstate Commerce Commission violated its own rules; and further, the Court did not rule that the plaintiffs had been denied due process of law.

I submit that conclusion should be stricken.

The Court: I think the conclusion is a correct one in view of what the Court thought about the circumstance of the Commission violating its own rules. Whether or not the Court had it in mind specifically in stating as a fact that all material allegations had been sustained by the preponderance of the evidence, the Court still thinks that that finding is correct and that it is correct so far as the violation of that rule is concerned and that this conclusion is correct, and the Court favors this conclusion of law.

Mr. Beresford: May I just make——

The Court: Yes.

Mr. Beresford: I'm wondering, since I have [78] taken Pages 7 and 8 out, if the Court should renumber——

The Court: That is a detail we can easily handle. You have No. 10. No. 10 will have to be stricken out. Look at your No. 10 finding on the bottom of Page 6.

Mr. Beresford: Just that last paragraph can be scratched out because it all relates to the two pages that were taken out.

The Court: I have deleted all of that remaining part of Paragraph X of the findings at the bottom of Page 6. Will Counsel now take an opportunity of carefully looking at what is left of the findings and conclusions. Let opposing Counsel see them first and see if there is any other inconsistency. Do you have a conclusion that this action should be remanded to the Commission for further proceedings there to determine something or to do anything?

Mr. Beresford: To fix the amount of reparations since——

The Court: Have you said that in the judgment form?

Mr. Beresford: Yes, your Honor, and that is identical language to the conclusions.

The Court: Do you see anything now objectionable from the defendants' standpoint in the proposed [79] findings and conclusions?

Mr. Tjossem: No, they have been corrected in the manner which we have discussed here.

The Court: Is your attitude such that you do not wish to note your approval on them?

Mr. Tjossem: I do not wish to note my approval.

The Court: Today's date is what?

The Clerk: The 19th, your Honor.

The Court: Where is the most important fact finding in your proposed findings of fact which finds that something was done that supports any one or more of the five separate conclusions of law, Mr. Beresford?

Mr. Beresford: The principal one, your Honor, is to be found in Paragraph V of the findings and Paragraph VI, which shows the facts upon which the violation of 162 are shown.

The Court: Do you propose in your findings in substance and effect a statement of fact that the procedural steps to be taken under the law by the railroads in effectuating a legal increase in rates were not taken, and that they were overcharged on a new rate which was then invalid?

Mr. Beresford: I have that.

The Court: And that they have been damaged [80] to the extent of the difference between the old valid rate and the new invalid one?

Mr. Beresford: While of course I don't have the exact phraseology, I have those basic facts in Paragraph VI, your Honor.

The Court: I am anxious to see that. That sentence in Line 2 at the top of Page 5, was there any condition to the Commission's approval of that 20 per cent increase? Did it condition its approval to the carriers doing anything procedurally or otherwise?

Mr. Beresford: In that sentence, yes, your Honor, I might clarify it to add——

The Court: What about notice?

Mr. Beresford: I was just going to say a five day notice, although could I amend that by adding——

The Court: I was just asking what the condition was, then we will talk about it.

Mr. Beresford: The condition was that the rate be published on a five day shortened notice.

The Court: Was that done?

Mr. Beresford: It was not done.

The Court: Then it would be appropriate from the Court's standpoint to put that in there. That was the point the Court was getting at, that procedurally the railroads did not comply with the conditions [81] imposed by the Commission. It could be stated in another fact like that. "Pursuant to certain procedural conditions"—"Subject, however, to a prior publication of some"—what was the detail there?

Mr. Beresford: Five day, your Honor, shortened notice.

The Court: Subject, however, to what? To publication by the railroads?

Mr. Beresford: Proper publication by the railroad on a five day——

The Court: To proper publication of a five day notice?

Mr. Beresford: Yes, your Honor, on a five day notice.

The Court: Publication on a five day notice, is that the word?

Mr. Beresford: Five day written notice.

The Court: "To proper publication of specified notice, which was not done." I think it would be more convenient to put that in after the "per ton". Put the period following "ton" in Line 5 or 6, whatever the number is, to a comma and add these words: "and subject to the condition"——

Mr. Beresford: Your Honor, before you write it in might I make one suggestion? [82]

The Court: Yes.

Mr. Beresford: "subject to the condition that all authorized increases"—I think that is quite important—"that all authorized increases be made on the five day written notice."

The Court: "and subject to the condition that the authorized"——

Mr. Beresford: "that all authorized".

The Court: Well, "the".

Mr. Beresford: Yes, "the authorized".

The Court: You are talking about the ones the

Commission did authorize upon certain conditions.

Mr. Beresford: I think that's correct, your Honor.

The Court: "subject to the condition that the authorized increases be given specified publication"?

Mr. Beresford: That's correct, your Honor.

The Court: "which was not done".

Mr. Beresford: Your Honor, instead of "which was not done", what was actually done was that an unauthorized increase was published, but I guess "which was not done" would amount to the same conclusion.

The Court: "which was not done". "subject to the condition that the authorized increase be given specified publication, which was not done." That is [83] the complaint.

Mr. Beresford: That's correct, your Honor.

The Court: I am initialing that on the margin. Now what other examples are there, according to your contention, of factual finding which are essential to the conclusions proposed?

Mr. Beresford: Paragraph VI when read with Paragraph V discloses that the rates that were published were unauthorized rates and hence in violation of Section 63.

The Court: In each factual statement there ought to be a specification of what it was that was wrong about it, and that is what I have done here. I have tried to give you that illustration. What is wrong about this: "In instances where a special commodity rate was published for peat, the

full 20 per cent was published and exacted." What was there wrong by that?

Mr. Beresford: It was not authorized by Ex Parte 162, which was an unauthorized freight rate increase.

The Court: Then the rates were special commodity rates. How does that compare with what these were?

Mr. Beresford: They were not authorized under [84] 162.

The Court: "Which 20 per cent and which increase and which special commodity rates were not authorized."

Mr. Beresford: That's right.

The Court: I want to insert that, then, right there. That is what my recollection is.

Mr. Beresford: I didn't hear the Court.

The Court: I say I want to insert that, and that is what my recollection is as to what was shown by the record.

Mr. Beresford: That is correct, it is what——

The Court: "That such 20 per cent increase and such commodity rates were not authorized." That insertion will go in Lines 14 and 15 after the word "rates", following the period following "rates" and before the words "That accordingly". Now, is there any other situation like that?

Mr. Beresford: Well, Your Honor, in Line 17—

The Court: "were unlawfully". "That accordingly from January 1, 1947 until January 1, 1948, shipments of peat or peat products originating from

points in British Columbia"—"were unauthorized, they were unlawfully made".

Mr. Beresford: Yes, Your Honor. [85]

The Court: "were unlawfully made subject to"—where would be the best place to put the word "unlawfully", or "improperly", some word to show it was without right that that was done? What word would you choose and where would you think it should be put?

Mr. Beresford: I would think the place of the word "unlawfully" would be after the word "were" in Line 17.

The Court: Does anyone have a better or different suggestion to make? Following the word "Columbia" is the word "were". The Court will put in there "unlawfully."

Mr. Beresford: Your Honor, in Line——

The Court: Now wait just a moment. I want to call your attention to this: "That the publication of the tariffs herein referred to were made on a 5-day" notice. Was that rightfully or unrightfully done?

Mr. Beresford: I was going to suggest that in Line 18, "of the unlawful tariffs herein referred to".

The Court: Is not what you intend to strike at by suggesting that finding which you believe was reasonably within the Court's decision, is not the fact that publication was made of this action was not a lawful publication, they had no right to [86] make that publication?

Mr. Beresford: It was not authorized. It was not authorized by 162.

The Court: "the tariffs herein referred to", do you mean the 20 per cent and the 6?

Mr. Beresford: Yes.

The Court: "That the publication of the tariffs in this paragraph referred to were wrongfully made" or "unlawfully made"—"were wrongfully made." "in this paragraph referred to"—mark out "herein." It reads now, "That the publication of the tariffs in this paragraph referred to were improperly made." That is what you mean, is it not?

Mr. Beresford: Yes, your Honor. In the next line then, to make the whole sentence read correctly, "pursuant to" should be stricken and put "in violation of" instead.

The Court: I do not quite get the place, Mr. Beresford. I do not quite get the place nor the sentence. Do you mean following "Ex Parte 162, which order permitted"?

Mr. Beresford: Just prior to that, Your Honor, where it says at the beginning of the line between 19 and 20 on the numbered page——

The Court: Yes. [87]

Mr. Beresford: "of publication pursuant to Ex Parte 162," I suggest that "pursuant to" be stricken and "in violation of" substituted.

The Court: "were improperly made on a 5-day shortened period of publication" what?

Mr. Beresford: "in violation of".

The Court: I approve of that. Now then, "which

order permitted authorized increases to be made on a 5-day notice." Does that add anything?

Mr. Beresford: Could I suggest that it be amended to read, "which order permitted authorized increases to be made only on 5-day short notice."

The Court: They did give a five day notice, did they not?

Mr. Beresford: But not for an authorized increase, so by adding the word "only" after "increases"——

The Court: "which order permitted only authorized"—"permitted only authorized".

Mr. Beresford: Yes.

The Court: "which order permitted only authorized increases to be made on 5-day notice." I believe the word "only" is the more emphatic to put there. "which order permitted only authorized increases".

Mr. Beresford: Yes, Your Honor.

The Court: Now what else is there? "That [88] on March 29, 1948, the carriers amended their master tariff to show the 6 cent maximum increase authorized on peat. Prior to said time, the carriers republished rates on peat originating in British Columbia to points in northern California by taking the full 20% increase." Is that the way you wish to leave that?

Mr. Beresford: In Line 23, Your Honor, "Prior to said time, the carriers unlawfully republished rates".

The Court: Now let me see where that is. Line 3. "Prior to said time, the carriers unlawfully republished rates". Does that relate to the same

things which you have complained of here in your complaint?

Mr. Beresford: Yes, Your Honor.

The Court: I have lost the place again. "Prior to said time, the carriers" did what?

Mr. Beresford: "unlawfully".

The Court: I have made that addition. VII is approved if it is clearly understood by all that that means the ones we are here talking about. Does anyone object to or wish to make any improvement of any of the statements made in Paragraphs VIII and IX? These dates as to when they were ordered, have you checked them carefully to see that no mistake was made?

Mr. Beresford: Yes, Your Honor. [89]

The Court: Mr. Tjossem, do you know of any inaccuracy in referring to those occurrences in the proceedings before the Commission?

Mr. Tjossem: No, they appear to be right to me, Your Honor.

The Court: And in IX, does anyone—who were the complainants in that case before the Commission?

Mr. Beresford: The plaintiffs herein, Your Honor.

The Court: The plaintiffs here. I think you should state wherever you use that word, you see, in Line 21 or 22 you use the words "plaintiffs herein" and then in the next line you use the word "complainants." You mean the same person, do you not?

Mr. Beresford: Yes, Your Honor.

The Court: Don't you think you ought to strike "complainants" and put "plaintiffs"?

Mr. Tjossem: The same correction in Line 25, Your Honor.

The Court: Yes. "That thereafter plaintiffs". Line 25, "complainants'", it would be "plaintiffs'", plural apostrophe.

Mr. Tjossem: Could I call the Court's attention to—— [90]

The Court: Yes, I would be glad to——

Mr. Tjossem: I would like to have you go back, if you would, your Honor, and reexamine your first suggested correction in Paragraph VI. I think it does not accurately state what the Court intends. As I noted the correction it read, "subject to the condition that the authorized increases be given specified publication which was not done."

Now, the contention is not, as I understand it, that the authorized increases were not published. The contention is that we published increases that were not authorized.

The Court: All that I am saying and intend to say by "which was not done" is that those increases which were authorized were not published as required by the order.

Mr. Beresford: I so understood it that way.

Mr. Tjossem: Well, your language is, "subject to the condition that the authorized increases be given specified publication, which was not"——

The Court: "which specified publication of authorized increases was not done." I will insert "of such authorized increases" if you wish. Instead of

“done” now, since I have changed the word I think “done” should be “made” now. What I am suggesting to modify [91] for the purpose of clarifying to meet the thought which Mr. Tjossem just then related, “and subject to the condition that the authorized increases be given specified publication of such authorized increases which was not made.” Does that make it clearer to your mind, Mr. Tjossem?

Mr. Tjossem: No, sir, it doesn't.

The Court: All I can say then is, “which authorized increases publication was not made.” That is the whole point of this, is it not, but some other increases were published? Is not that your understanding?

Mr. Beresford: That's my understanding, your Honor, yes.

The Court: “which publication was not done” or “made”. Which do you prefer, “done” or “made”?

Mr. Beresford: Either one, your Honor.

Mr. Tjossem: I have no choice.

The Court: “which publication was not done.” I am going to leave it like it is, because I do not think there is much choice. Is there anything else to be said about it? (No response.) As to findings and conclusions, let these findings of fact and conclusions of law be now entered.

I wish now to take up the form of the judgment. [92] What is there to be desired as to form from the standpoint of either party or either Counsel?

Mr. Tjossem: I notice in Conclusion 5 again they have used the word “complainants”. I hadn't no-

ticed it before. Do you want to substitute "plaintiffs"?

The Court: Yes. Where is that?

Mr. Tjossem: That is in substituted Page 2 of the conclusions of law in Conclusion No. 5.

The Court: The conclusion, you say?

Mr. Tjossem: Conclusion No. 5 reads, "That the complainants are entitled".

The Court: What line?

Mr. Tjossem: Line 8.

The Court: "That the plaintiffs are entitled to judgment against the defendants". I guess there will be other places that some of us have overlooked. Down in Line 12 the word "plaintiffs" is written, and so that is consistent.

Mr. Beresford: Your Honor, I have just noticed in Page 9 of the conclusions, just the page ahead of the one you've been looking at, Paragraph III, I have referred to Finding X which has now been removed, where I say in Line 27, "That where shipments of peat, as set forth"— [93]

The Court: Yes, I see it. Do you want to mark out "as set forth"?

Mr. Beresford: Yes, "as set forth in Finding X hereinbefore." For "shipments," shouldn't it be substituted "herein complained of"?

The Court: Yes. Are the shipments mentioned in any other finding? IV, for instance? That is just naming the shipper, is it not? So that suggestion will take care of it. What is that, now?

Mr. Beresford: Strike out "as set forth in Find-

ing X hereinbefore" and insert "herein complained of".

The Court: "as herein complained of".

Mr. Beresford: Yes, your Honor.

The Court: I have done that also. Now let us turn to the judgment form. Is there anything wrong with No. 1? Of course No. 3 should be No. 2. They should be interchanged, should they not? It does not matter though, I guess.

Mr. Beresford: No.

The Court: Is there any objection to Nos. 2, 3? It will be No. 4 instead of No. 3. Nos. 1, 2 and 3 all appear on Page 2 with No. 3 running over onto the page which I will mark 3, previously unmarked, the third sheet of paper, and then following that is a [94] paragraph also numbered 3 which should be No. 4.

Mr. Beresford: Yes, your Honor.

The Court: I will mark it No. 4. Is there any objection to any one of these as far as form goes? Do you say anything about against whom the judgment here is ordered. You see, you get into the question of the identity of the defendants again, do you not?

Mr. Beresford: I think the only one we can have a judgment for costs against, your Honor, is the intervening defendants, isn't it?

The Court: It is authorized to have judgment against them. I think it should be so stated. After the words "awarded judgment," insert "against intervening defendants." Is there any objection to that term? (No response.)

Today's date is the 19th?

The Clerk: Yes, your Honor.

The Court: Let this judgment now be entered.
Counsel are excused unless there is something else.
Is there anything else, Mr. Tjossem?

Mr. Tjossem: No.

The Court: Is there anything else Counsel have
an interest in?

Miss Locke: That's all, your Honor.

The Court: Very well. Counsel are excused.

(Adjournment at 2:50 p.m.) [95]

[Endorsed]: Filed Sept. 4, 1956.

PLAINTIFFS' EXHIBIT No. 2

Record before the Interstate Commerce Commis-
sion in Docket No. 29974 as Certified by said
Commission to the District Court.

* * * * *

Before The Interstate Commerce Commission

Docket No. 29974

In the Matter of
ACME PEAT PRODUCTS, LTD., ET AL,
Complainants,

vs.

THE AKRON CANTON & YOUNGSTOWN
RAILROAD COMPANY, ET AL,
Defendants.

Plaintiffs' Exhibit No. 2—(Continued)
TRANSCRIPT OF STENOGRAPHER'S
MINUTES

117 Federal Office Building, Seattle, Washington, Wednesday, November 10, 1948.

Met, pursuant to notice, at 9:30 A.M.

Before: George J. Hall, Examiner.

Appearances: Fred H. Tolan, 1103 Smith Tower, Seattle, Washington, representing the Complainant;

A. J. Clynch, 404 Union Street, Seattle, Washington, representing Defendants;

R. Paul Tjossem, 404 Union Street, Seattle, Washington, representing Defendants;

Charles W. Burkett, Jr., 65 Market Street, San Francisco, California, representing Defendants;

Harold G. Boggs, 909 Smith Tower, Seattle, Washington, representing the Northern Pacific Railway Company, Defendant.

Proceedings

Exam. Hall: The Interstate Commerce Commission has set for hearing at this time and place this docket No. 29974, Acme Peat Products, Ltd., Et Al, versus the Akron, Canton & Youngstown Railroad Company, Et Al. Who appears for the Complainant?

Mr. Tolan: Fred H. Tolan, 1103 Smith Tower, Seattle, Washington.

Exam. Hall: Are there any other appearances on the behalf of the Complainant, or interveners on behalf of the Complainant? Apparently not.

Who appears for the Defendants?

Plaintiffs' Exhibit No. 2—(Continued)

Mr. Clynch: A. J. Clynch and R. Paul Tjossem, attorneys at law, 404 Union Street, Seattle, Washington, appearing as counsel on behalf of all Defendants in the proceeding. Mr. Tjossem will be here shortly.

Mr. Burkett: Charles W. Burkett, Jr., 65 Market Street, San Francisco, California, appearing for the Defendants.

Exam. Hall: Apparently there are no other appearances on behalf of the Defendants. On account of a continuation of Docket No. 30007, I will recess the hearing on Docket No. 29974 until 11:00 o'clock this morning. So those in attendance upon that hearing will be excused.

(Whereupon, recess was taken.)

Exam. Hall: It is now 11:45. We will continue with the [3] hearing on Docket No. 29974. Now, would you mind stating at the outset just what the issues are in this case, very briefly and succinctly?

Mr. Tolan: Docket No. 29974 was filed by the Canadian Peat Association and others seeking reparations from the Defendants for the excess sums assessed by them on carload shipments of peat moss above the six-cent maximum provided by the Interstate Commerce Commission's order in Ex Parte 62. Further, there is one remaining rate which has not been brought into compliance with the Interstate Commerce Commission's order, and that is the rate from the British Columbia producing area to the San Francisco Bay area. We are asking the Interstate Commerce Commission to prescribe the base rate in effect on December 31, 1946,

Plaintiffs' Exhibit No. 2—(Continued)

plus the increases, that is, the six-cent maximum and other increases to date.

Exam. Hall: How can the Commission prescribe a rate from British Columbia to San Francisco?

Mr. Tolan: Where *are* the carriers are voluntarily entered into a rate the Interstate Commerce Commission has jurisdiction from the Border for the main haul, from the Border.

Exam. Hall: I realize that. The American newspaper decision covers that, but you are asking for a through rate from British Columbia to California?

Mr. Tolan: That is right. I would like to put a witness on out of order. [4]

Mr. Tjossem: I would like to make a statement on behalf of the railroad Defendants, but with the understanding that I may make the statement later I will permit the witness to go on.

Mr. Tolan: That is agreeable. I will call Mr. Pittack.

A. H. PITTACK

was sworn and testified as follows:

Direct Examination

Q. (By Mr. Tolan): Will you give your name and address for the Reporter?

A. A. H. Pittack; 4000 First Avenue South, Seattle.

Q. What firm are you with?

A. Van Waters and Rogers, Inc.

Q. What are your duties with that firm?

Plaintiffs' Exhibit No. 2—(Continued)

(Testimony of A. H. Pittack.)

A. Manager of the feed and fertilizer departments.

Q. Do you handle the sales of peat within that department? A. Yes.

Q. Do you handle the sales from British Columbia of peat within that department?

A. Yes.

Q. How long have you been handling the sales of peat?

A. With the firm of Van Waters and Rogers, since the end of 1938.

Q. Would you describe briefly your marketing setup for the handling of peat sales? [5]

A. Well, our marketing setup for the handling of peat sales is, we have several offices,—our offices are located in Portland; San Francisco; Los Angeles; Dallas, Texas; Spokane, and Billings, Montana; also, Boise, Idaho. Our policy in the handling of the sales of peat moss is in purchasing outright from the producer in British Columbia and selling to firms and dealers throughout most sections of the United States where the peat must move.

Q. Would you name two large marketing areas for peat, for the sale of peat?

A. Well, I would classify our major outlets here, what might be termed the Midwest section along the Mississippi Valley area from Chicago south, and somewhat west of Chicago; also in the State of California.

Plaintiffs' Exhibit No. 2—(Continued)

(Testimony of A. H. Pittack.)

Q. Are you familiar with the fact that in 1947 the peat rates were increased 20 per cent from British Columbia? A. Yes.

Q. Do you know what the base rate was on peat in 1946 from British Columbia to the Midwestern points?

A. Well, the old base was 72 cents; I have forgotten exactly what the first increase was—20 per cent.

Q. In selling peat which you purchase from British Columbia, do you run into competition with other products from California? A. Yes. [6]

Q. Will you explain that competition?

A. Well, the competition that we run into in California are sales of peat moss in California,—I might say that the sale of peat moss in California would be mostly of the horticultural kind, that is, for use in gardening and horticultural work; and in California we run into substitutes in the form of bog peat or black top soil.

Q. Where does that occur?

A. That occurs wherever there is a lowland and lake area, and usually what it is is bottomland, decomposed vegetation, and that is brought out and dredged out and sold usually in a wet or semi-dry form. And then there is competition from various products such as ground bark. The Weyerhaeuser people manufacture some ground bark; and there are the California redwood people who manufacture ground redwood bark.

Plaintiffs' Exhibit No. 2—(Continued)

(Testimony of A. H. Pittack.)

Q. Will you explain the use of that in competition with peat moss?

A. Yes, the use of ground bark for agricultural purposes is used much the same as peat moss; that is, it is worked into the soil. The California sales are mostly for purposes of mixing into the soil. The soil there is what you call the adobe, which is very hard, and with the application of moisture and then allowed to become dry, it gets quite hard; so it is desirable to have something such as peat moss or ground bark or some other material that [7] will help break the soil down into lumps; and in that respect the forest products such as ground bark can do a very reasonable or respectable job.

Q. Are there any other peat producers in California?

A. There are no peat producers in California producing peat moss of the same quality. However, in the Alturas region there is some competition of what they term peat. It is just slightly different as a product than our peat moss in British Columbia, which we term Sphagnum peat moss.

Q. What are the trade names of those peat substitutes?

A. In the forest products, one of them is called "Topper," that is, used for top dressing of the soil; and, if I am not mistaken, they call it "soil peat." They do not spell it "peat."

Q. Of the over-all sales of peat that you have in California, which of the two types of peat do you

Plaintiffs' Exhibit No. 2—(Continued)

(Testimony of A. H. Pittack.)

sell most, the horticultural variety or the poultry litter variety?

A. Our business is leaning very heavy towards the horticultural; I would say our business runs 75 per cent horticultural.

Q. Why don't you sell more of the poultry litter variety?

A. Well, in the poultry litter there are many, many competitive items; one of the considerations is the price of peat moss, that is, the delivered price of peat moss has been almost prohibitive; it has been increased considerably. The price has almost doubled.

Q. Since when?

A. Since 1939 or 1940. That is the delivered [8] price. I think a great deal of that has been due to the increase in rates, and as the delivered price of peat moss has increased we have run into all sorts of competition in the poultry litter field. For example, straw of almost any nature, pure straw, wood shavings, sawdust, and the like. Corn cobs,—green and dry corn cobs.

Q. May I ask that you restrict the answer to California. You don't use corn cobs in California?

A. No, that would be more in the Middle West.

Q. Will you kindly restrict your answers to California.

A. Well, you have wood shavings, sawdust, straws; and in California there is,—it is either taken in California or Arizona or New Mexico,—

Plaintiffs' Exhibit No. 2—(Continued)

(Testimony of A. H. Pittack.)

There is a sort of lava rock, a porous rock which has been processed and is used quite extensively for poultry litter.

Q. Has the production of peat moss and all kinds of fertilizers, in general, increased during the last three years? Speaking particularly of the prices?

Mr. Tjossem: I don't understand that this witness has qualified himself as an expert on fertilizer.

Mr. Tolan: He testified he was in charge of the feed and fertilizer department of Van Waters and Rogers and marketed fertilizers, including feed.

Exam. Hall: All right. The objection is overruled.

A. Are you speaking of manufactured fertilizer, [9] such as is produced by Swift and Company, for instance?

Q. (By Mr. Tolan): That is right.

A. Yes; the price of manufactured fertilizers has increased.

Q. Has the f.o.b. British Columbia price of peat moss increased in the past two years?

A. Yes, it has increased.

Q. How much?

A. The f.o.b. British Columbia price has increased greatly since 1939.

Q. In the last two years? A. It has not.

Q. Other fertilizers have increased in price, but peat moss has not increased in price?

Plaintiffs' Exhibit No. 2—(Continued)
(Testimony of A. H. Pittack.)

A. That is correct when you are speaking of peat f.o.b. British Columbia.

Q. Do you sell peat in the Middle West?

A. Yes.

Q. After the 20 per cent increase went into effect on peat, raising the rates from 72 cents to 86 cents, did your sales suffer in the Middle West?

Exam. Hall: From and to where?

Q. (By Mr. Tolan): From British Columbia points to Iowa, for example.

A. You are referring to the Group D territory?

Q. Yes, D, E, and F. A. Yes. [10]

Q. Will you explain how that came about?

A. With your increased delivered price a great deal of pressure was put to bear by the manufacturers of substitute materials, and the higher delivered price of peat moss has opened the way for a more extensive use of these substitutes.

Q. What are those substitutes in use throughout the Middle West?

A. One of the main substitutes is a sugar cane product produced around New Orleans; I think around Raceland, Louisiana, where there is one; and there is another point in that vicinity. This is a processed sugar cane, a more or less processed material that is used for poultry litter, and the finely ground material is used for horticultural uses the same as peat moss. That is one of the main items of competition in the horticultural field, with the exception of the poorer grades of peat, or top soil,

Plaintiffs' Exhibit No. 2—(Continued)

Testimony of A. H. Pittack.)

which is brought in from low areas, and particularly the lake countries throughout Minnesota and Wisconsin; and then, again, in your poultry litter field are the dried and green corn cobs, with some light medication added, and, again, your straws, your oat hulls, and your forest products.

Q. Did you in 1946 write contracts for the sale of peat moss in western areas? A. Yes. [11]

Q. Were those contracts valuable in the western area? A. Yes, they were valuable.

Q. In 1947, I should say.

A. They were valuable. However, we ran into some trouble with some of our contractors in that they were unable to take the full amount of the contract, and in several instances we carried over the contract balances into 1948.

Q. Why did they refuse to take their full amount contracted for?

A. They simply said that the movement had been much less than they had anticipated, due to the stress of competition.

Exam. Hall: Are you pretty nearly finished with the witness?

Mr. Tolan: Yes; that is all.

Exam. Hall: Off the record.

(Discussion off the record.)

Cross Examination

Q. (By Mr. Tjossem): In testifying about the relative price of peat moss, 1946 compared with

Plaintiffs' Exhibit No. 2—(Continued)

(Testimony of A. H. Pittack.)

1948, you were speaking on the basis of f.o.b. Canada? A. Yes.

Q. Do I understand that you buy peat moss from Canadian producers f.o.b. Canada?

A. We buy some f.o.b.; in fact, we buy a great deal; and we buy some on a delivered basis. [12]

Q. For the first four months of 1947, would you say that most of the peat moss was bought on an f.o.b. Canadian origin basis or on a delivered basis?

A. Most of the peat moss was bought on a Canadian origin f.o.b. basis.

Q. By the way, are you familiar with the names of the companies complaining here?

A. I believe they are all represented, except one, I believe, up there.

Q. In making the statement that you just made with reference to your purchases in Canada, you are referring to the purchases that were made by the Complainants in this case?

A. That is true.

Q. I take it that when you buy f.o.b. Canada you pay the freight on it from Canada; is that correct? A. That is correct.

Q. And now you testified, as I recall, that with respect to the horticultural use of peat moss and with respect to the use of peat moss as poultry litter,—what is the difference, if any, between peat moss that is used for horticultural purposes as compared with peat moss that is used for poultry litter?

A. Granulation.

Plaintiffs' Exhibit No. 2—(Continued)

(Testimony of A. H. Pittack.)

Q. By "granulation," you mean there is simply a difference in the fineness of the finished product?

A. Yes.

Q. Which one is finer? A. Horticultural.

Q. Other than that, the product is exactly the same? Both products are exactly the same, other than that? A. Yes.

Q. I also notice from your testimony that you find in California, as well as from the Midwest, considerable competition with other competing commodities, both with respect to the poultry litter form of peat moss and the horticultural form of peat moss; is that correct? A. Yes.

Q. With respect to the horticultural form of peat moss, one of the products in California consists of a ground bark of trees; is that correct?

A. That is correct.

Q. Now, from your own experience with your company, would you say that the ground bark of trees, when introduced into the soil, actually introduces some food into the soil?

A. I would say it does not.

Q. With respect to peat moss that is used for horticultural purposes, would you say that the addition of peat moss to the soil would add any food value to the soil?

A. It does not, but I would qualify that.

Q. Just a moment. You have answered it. That
[14] is sufficient. You stated that about three-

Plaintiffs' Exhibit No. 2—(Continued)

(Testimony of A. H. Pittack.)

fourths of the peat moss sold in California was of the horticultural type; is that correct?

A. That is correct.

Q. What is your experience with respect to the type of peat moss that you sell from the Canadian origins into the Middle West, such as D and E territory? A. With respect to what?

Q. As to whether or not it is for horticultural purposes or for poultry litter?

A. Again, our experience is heavy to the horticultural rather than to the poultry litter.

Q. Taking the total sales from these Canadian producers, what percentage of your sales would be finely ground as horticultural peat moss and what would be sold as poultry litter?

A. Our sales run from 70 to 75 per cent horticultural.

Q. Do you know whether or not this peat moss product is used for any other purpose, and does your company sell it for any other purpose than poultry litter or horticultural purposes?

A. We don't sell it for any purpose, so far as we are concerned; those are the purposes for which peat moss is used.

Q. From your experience with the commodity, do you know whether it is used for other purposes?

A. Processed differently, I believe it has been tried for insulation. In the form of pads, it has been used, and, I believe successfully, in the ship-

Plaintiffs' Exhibit No. 2—(Continued)

Testimony of A. H. Pittack.)

ing of vegetables such as asparagus; such as [15]
asparagus pads; that is about the extent of it.

Q. It is used for packing material as well as
in the construction of homes?

A. I believe it has been tried for that.

Q. Do you know whether it has been success-
fully used in either one of those uses?

A. It is for the shipping of vegetables as aspara-
us pads, but I cannot say as to the insulation.

Q. I believe you testified with respect to the
period of time in which the full 20 per cent maxi-
mum increase in rates was published by the car-
riers after the Commission's decision in *Ex Parte*
62, and that your sales into the D and E groups,
in the Middle West declined; is that your testi-
mony? A. Yes.

Q. How much of a decline did you have? What
period do you use as a base period, and what de-
crease was there with respect to that base period?

A. From our experience, we will say, for the
year 1947; our sales of peat moss dropped from
100 to 25 per cent from the year previous.

Q. Was that decline uniform on both commodi-
ties of peat moss going into the Middle West terri-
tory? A. I would say yes.

Q. This cane material that you spoke of as
[16] being a competitive material, that is confined
to the Middle West? A. Yes.

Q. Is that competitive with both forms of peat
moss?

Plaintiffs' Exhibit No. 2—(Continued)

(Testimony of A. H. Pittack.)

A. Yes; they make both types, both fine ground and the coarsely ground.

Q. Where is that produced?

A. The sugar cane product?

Q. Yes. A. It is produced in Louisiana.

Q. You found it competitive in what territory with peat moss?

A. We found it strictly competitive to peat moss in the Middle West section; it is competitive to peat moss in California.

Exam. Hall: Well, now, I think you have covered the whole territory, on direct and cross examinations; how much more have you on that?

Mr. Tjossem: I think perhaps they will have other witnesses with respect to this subject, and therefore I can dispense with any further cross examination.

Exam. Hall: All right. You are excused.

(Witness excused.)

Exam. Hall: We will adjourn until 1:00 o'clock.

(Whereupon, at 12:10 p.m., hearing was recessed until 1:00 o'clock p.m. same day, same place.) [17]

Afternoon Session

(1:00 o'clock p.m., November 10, 1948)

Exam. Hall: The hearing will be resumed in Docket No. 29974. I understand there is another appearance?

Plaintiffs' Exhibit No. 2—(Continued)

Mr. Boggs: Harold G. Boggs, 909 Smith Tower, representing the Northern Pacific Railway.

Exam. Hall: You may proceed, Mr. Tolan.

Mr. Tolan: Mr. Strang.

ANDREW B. STRANG

was sworn and testified as follows:

Direct Examination

Q. (By Mr. Tolan): Will you please state your name and address?

A. Andrew B. Strang; 3438 West 9th Street, Vancouver, British Columbia.

Q. What is your business?

A. I am an accountant.

Q. How long have you been an accountant?

A. Approximately two and one-half years, for his firm.

Q. What firm is that?

A. Atkins and Durbrow, Ltd.

Q. You are familiar with their operations?

A. Yes.

Q. That company is the successor in interest to what company?

A. The British Columbia Peat Company, Ltd.

Q. Will you describe very briefly for the record the size of the company, its location, and general method of doing business?

A. Atkins and Durbrow now operates the peat bog located in the delta lands of the Fraser River in British Columbia. It employs approximately 90 individuals, and sells peat moss, both horticultural

Plaintiffs' Exhibit No. 2—(Continued)

(Testimony of Andrew B. Strang.)

and for poultry litter, for export to the United States, principally.

Q. And what are the values of your shipments?

A. We average roughly half a million dollars worth of peat moss produced and exported per annum.

Q. Exported, you mean to where?

A. To the United States market. 98 per cent of our production is exported to that market.

Q. How many bales do you produce per year, and what is the size of the bales?

A. That would average about a quarter of a million bales, 250,000.

Q. What is the approximate value of those bales?

A. The approximate value to our company would be about \$1.75 to \$1.80 per bale.

Q. To what areas do you ship into the United States?

A. We ship to all parts of the United States, but due to the fact that we have our own subsidiary company which acts principally as our sales outlet, [19] the greater section or portion of our production is placed in the Eastern states where the said sales organization is located.

Exam. Hall: What do you mean by the Eastern states? The Atlantic Seaboard?

The Witness: Atlantic Seaboard, sir, and principally those states coming west to the Mississippi River.

Plaintiffs' Exhibit No. 2—(Continued)

(Testimony of Andrew B. Strang.)

Exam. Hall: You know out here people have a different idea with respect to what is east, and everything that is east of the Rockies would be east from here. You mean on the Atlantic Seaboard?

The Witness: I should qualify that and say the Eastern Seaboard States, the Mid-East States and the Central States.

Exam. Hall: East of the Mississippi River?

The Witness: Yes, principally.

Q. (By Mr. Tolan): Does Atkins and Durbrow sell peat on a delivered price basis?

A. It does.

Q. Where does it maintain sales offices?

A. We have them in, roughly, 10 cities: New York, Boston, Detroit, Chicago, Kansas City, Richmond, Virginia, and many others.

Q. Would you give the percentage of the Atkins and Durbrow production of the total produced in British Columbia?

A. We estimate that the ratio which our production holds to the total British Columbia production to be about 17 to 20 per cent. [20]

Q. That is, of all the Canadian production?

A. I would say, roughly, one-eighth, or 12 per cent of all Canadian production.

Q. How does the production of peat, as produced by you, differ from methods used by others?

A. There are two methods of drying the peat; we use what we call the hydraulic process; the first

Plaintiffs' Exhibit No. 2—(Continued)

(Testimony of Andrew B. Strang.)

method and the most common method is sun drying; the peat is picked up from the bog and stacked in various forms, sometimes in a way like a chimney, which creates its own draft, and it is dried by the sun and the wind.

Q. In shipping to the East, do you meet competition from shippers located in Eastern United States and Eastern Canada?

A. I wish I could have that question again.

Q. Do you, in marketing the British Columbia produced peat in the Eastern part of the United States, have competition from other producers located nearer the Eastern market than you are?

A. We do; we have a great deal of competition, and we are experiencing it now particularly. In the State of Maine, the Eastern provinces of Canada, notably New Brunswick, Nova Scotia, and to some extent Ontario; they all produce peat moss.

Q. Are you familiar with the fact that during most of the year 1947 the Eastern producers [21] enjoyed a 6 per cent maximum increase on peat moss shipments?

A. We are, definitely.

Q. How did you become aware of that fact?

A. Naturally, our sales organization would discuss that; we discovered that our prices were out of line with the others to the extent of almost 20 per cent, and naturally when we were checking up we discovered that a part of the reason was the 10 per cent differential in our shipping expense.

Q. Did you from the period January 1, 1947

Plaintiffs' Exhibit No. 2—(Continued)

(Testimony of Andrew B. Strang.)

through most of the year 1947 enjoy a 6 cent maximum on shipments from British Columbia?

A. I am not too clear on when the adjustment was made. As I understand it, it was originally 20 per cent. As I understand it, the rate was subsequently reduced from a 20 per cent increase to a 6 cent maximum, some time about the third month in 1947.

Q. It was the 10th month.

A. The 10th month?

Q. Yes.

A. Therefore, we did not receive the benefit of it,——

Q. Have the costs of production of peat moss gone up in British Columbia since 1946?

A. They have, like the cost of production of all goods. We estimate that the cost of production is approximately 25 per cent. [22]

Q. How much has the peat moss price increased in British Columbia compared to other costs,—strike that question. Let me rephrase it. Have you increased the price on peat moss since 1946?

A. We have in the case of our own company to the extent of 10 cents per bale.

Q. Did you make any allowance for any of those shipments going East of Chicago?

A. If a shipment goes East of Chicago, I presume you mean those having freight rates above the 86 cent zone?

Q. That is correct.

Plaintiffs' Exhibit No. 2—(Continued)
(Testimony of Andrew B. Strang.)

A. Where there is a jump of 12 cents, we reduced the rate of our bale 10 cents a bale in order to have the product, in the zone of higher freight rates, something like the price of our competitor.

Q. Going back to 1947 when the 6 cent maximum was applicable on Eastern shipments, while the full 20 per cent was applicable on shipments from British Columbia, would the full surcharge on the Eastern shipments to a full 20 per cent, depending on the zone in lieu of the maximum, have assisted your company? A. Certainly.

Q. Will you explain for the record how it would have done so?

A. As I previously stated, we had to contend with a discrepancy of almost 10 cents per bale as long as the rates were increased on the Eastern States, by an eight cent maximum, and on the [23] Western areas by a 20 per cent flat increase; the differential there would, of course, have to be reflected in our profits.

Exam. Hall: Well, what territory are you speaking of? You are using, interchangeably, various phrases; you at one time say six cents and at another time you say eight cents, and then you use the term 20 per cent. What does the six cent maximum apply on, per hundred pounds, per bale, or what?

Mr. Tolan: I think I can identify it this way, Mr. Examiner. When the increase of Ex Parte 162

Plaintiffs' Exhibit No. 2—(Continued)

Testimony of Andrew B. Strang.)

was published on January 1, 1947, the rates were set up this way:—

Mr. Tjossem: I think the witness should testify.

Exam. Hall: I think so, too.

The Witness: As I understand it, when the rates were originally set up, peat moss being produced in smaller volume in the Eastern states and not having quite the prominence in the movement, was automatically classed as a fertilizer. That is as I understand it. In the Western states, being so close to British Columbia where a larger percentage of the peat moss is produced in Canada, the volume of traffic was much heavier and, as such, much more noticeable, and, consequently, it received special attention and it was granted a straight increase of 20 per cent, which, of course, is in comparison with the six cent maximum in the Eastern states and the 20 per cent increase on the Western.

Exam. Hall: I don't desire to lead you into a rate situation, if you are not thoroughly familiar with the rates; but I would like to ask you if you know whether this six cent maximum that you speak of was applied to what we call a through overhead rate as distinguished from a combination rate?

The Witness: I am not familiar enough with that.

Mr. Tolan: There will be testimony on that later, Mr. Examiner.

Exam. Hall: All right; go ahead.

Plaintiffs' Exhibit No. 2—(Continued)

(Testimony of Andrew B. Strang.)

Q. (By Mr. Tolan): Did you sell all the peat which your Company produced during the year 1946?

A. No, we did not.

Q. The year 1946?

A. Oh, yes; in 1946, we did.

Q. Did you sell all of the peat that you produced in the year 1947?

A. We carried a stockpile which varied, roughly, a few thousand bales; 9 to 10 thousand bales.

Q. Why is that carry-over considered an excessive amount?

Mr. Tjossem: Just a moment. I object to that as a leading question. The witness has not said that it was an excessive amount, and counsel is putting the words in the mouth of the witness.

Mr. Tolan: I will withdraw the question. I will rephrase it. [25]

Q. (By Mr. Tolan): What was the opinion of your Company in regard to the carry-over?

Mr. Tjossem: I'll object to that. If he has an opinion of his own, he can give it. If it is understood he is testifying and giving his own opinion, then I have no objection.

Q. (By Mr. Tolan): In your opinion, what do you think of that carry-over of production?

A. Well, possibly, the whole picture will become a little more evident and clear when you understand the production of the Company. As I said before, we have a hydraulic operation; we are not dependent upon the time or the weather for our

Plaintiffs' Exhibit No. 2—(Continued)

(Testimony of Andrew B. Strang.)

production and, as such, we can adjust ourselves to meet the demands of the trade. Nevertheless, during the year 1947 we did carry forward a stockpile of, roughly, 9 to 10 thousand bales of a value of approximately \$15,000, which, despite the fact that we had shut down for a period of two or three weeks during the summer months when the demand for the supply was falling off, we, nevertheless, in spite of the adjustments, still carried forward the stockpile.

Exam. Hall: Off the record.

(Discussion off the record.)

Q. (By Mr. Tolan): Are you presently making a discount in price on shipments going East of the Chicago area? A. Yes, we are.

Q. And what is the purpose of that discount?

A. As previously stated, because of the freight rate, and in order to get into those zones we had to make some reductions.

Mr. Tolan: That's all.

Exam. Hall: You may cross examine.

Cross Examination

Q. (By Mr. Tjossem): You say that you are presently making a discount of 10 cents a bale in the movement beyond the Chicago zone?

A. Yes.

Q. And you say that is because of the excessive freight rates? A. Yes.

Q. What freight rates?

Plaintiffs' Exhibit No. 2—(Continued)
(Testimony of Andrew B. Strang.)

A. At the present time, Zone A, \$1.04; Zone B, \$1.01; Zone C, \$.98.

Exam. Hall: Are those the transcontinental group?

The Witness: I think they are.

Exam. Hall: That sounds like it.

Mr. Tolan: They are, sir.

The Witness: Zone D, \$.86. That is for a bale.

Q. (By Mr. Tjossem): When you use the word "excessive," what do you mean by that?

A. I refer to the large increase or discrepancy between 86 cents and 98 cents.

Q. Your testimony is that you referred to all the groups in the 86 cent zone and anything in [27] excess of that would then be excessive?

A. I didn't imply that.

Q. What did you imply?

A. I implied that the freight burden upon us by shipping into that zone, as compared with the Eastern producers shipping into similar zones, placed us at a disadvantage.

Q. Are you familiar with the number of miles your commodity travels in reaching the zones beyond Chicago? A. I am.

Q. How far is it?

A. Do you want that in mileage?

Q. Just as a rough approximation?

A. Well, I suppose my guess is as good as anybody else's.

Plaintiffs' Exhibit No. 2—(Continued)

[Testimony of Andrew B. Strang.]

Q. You said you knew, and that is why I asked you the question. What is your knowledge of what the distance is?

A. Let me call it 3500 miles.

Q. In that area you are in competition with what producers?

A. We have to contend with competition, as I stated before, from the producers of peat moss in Maine, the Eastern provinces of Canada, and the other products such as ground corn cobs, sugar cane husks, sugar cane refuse, and various other competing products.

Q. Now, have you any knowledge as to how far distant the producers in Eastern Canada are from the markets that you are trying to reach East of Chicago? [28]

A. In the light of the last question, I don't think that is quite as far.

Q. What is your idea of how far it is?

A. I would not hazard a guess, except to say that I imagine it would be, roughly, 1000 miles.

Q. As compared with 3500 miles on your transportation? A. Yes.

Q. That would be approximately the same distance from the Maine producers?

A. I beg your pardon?

Q. Is that the distance of the Maine producers from the area that you are talking about?

A. You must realize, of course, that you have several sources of competing commodities going into

Plaintiffs' Exhibit No. 2—(Continued)

(Testimony of Andrew B. Strang.)

the territory; there are, first of all, the Eastern provinces of Canada, the Southern states in the United States, and the Province of Ontario.

Q. You mean that you are trying to reach the Eastern Seaboard? In these rate groups that you gave, ranging from \$1.04 to 98 cents, would those rates allow you to reach, for example, the market in New York City? A. \$1.04, you mean?

Q. Yes? A. It does at the present time.

Q. In other words, you can reach New York today from your plant in British Columbia on a \$1.04 rate? [29]

A. It is not a case of being able to reach the State of New York. As I understand it, to ship to New York we pay the freight rate of \$1.04.

Q. You are doing that today? A. Yes.

Q. You are doing that to meet the competition with the Maine producer, who is also selling in New York State?

A. We are meeting competition only by making adjustments.

Q. And that adjustment, as I understand it, is the price of 10 cents lower in New York, for example, than you are getting in the Chicago area?

A. That adjustment, as I mentioned, was 10 cents a bale in those zones having freight rates above 85 cents,—that is not the only adjustment we make.

Q. As you approach the Eastern Seaboard, do you make a greater adjustment?

Plaintiffs' Exhibit No. 2—(Continued)

(Testimony of Andrew B. Strang.)

A. That is the case generally.

Q. You mean a 10-cent adjustment for the area East of Chicago which, I understand now, increases as you come to the Eastern Seaboard? Do you mean to say that 10 cents a bale as an adjustment is not the final adjustment?

A. I understand we have to make a greater adjustment.

Q. You mean that you receive a return of 10 cents less, or is it a difference in the price to the consumer of 10 cents less in the Eastern zones, [30] Chicago as compared with the prices in the Eastern zones?

A. We sell it at a discount of 10 cents a bale in this area, as I previously outlined. As such, the Company realizes from the sale to the customer 10 cents less.

Q. What is the current price per bale in the Chicago area?

A. That is in the 86-cent territory?

Q. Are you quoting a selling price, less freight, in that area?

A. It would be \$1.85, plus 86 cents.

Q. What are you getting for it in New York State?

A. It would be \$1.75, which would be a discount of 10 cents, plus a freight rate of \$1.04.

Q. Do you quote all your prices delivered, f.o.b. destination? A. We do.

Q. Who pays the freight?

Plaintiffs' Exhibit No. 2—(Continued)

(Testimony of Andrew B. Strang.)

A. The Company prepays the freight.

Q. Do your consignees understand that they must reimburse you for the freight that you pay?

A. The price is f.o.b. at the consignee's point.

Q. So that today, for example, in quoting New York, you take your base price of \$1.75, and you multiply the weight of the bale, in accordance with its weight per hundred pounds, adding thereto a rate of \$1.04, and then you arrive at the price f.o.b. destination?

A. You must realize that these bales are made at [31] our sales agency, and they are our outlets; and, as such, those prices which Atkins and Durbrow sell those bales in Vancouver,—they have to be adjusted 10 cents a bale less on account of the fact that they are going to New York.

Q. What price would your sales agency today quote a New York buyer of peat moss per bale?

A. \$3.21, I think, is the average.

Q. \$3.23? A. I beg your pardon. \$3.03.

Q. Now, what price per bale are you quoting today in Chicago?

Exam. Hall: He said it was \$1.85 plus 86 cents.

The Witness: I think now he refers to the price to the consumer in Chicago.

Q. (By Mr. Tjossem): That is correct. What is the price that you are quoting today on peat moss?

A. Well, it would be roughly, 26 cents less, I would say.

Plaintiffs' Exhibit No. 2—(Continued)

(Testimony of Andrew B. Strang.)

Q. And that difference between the Chicago price and the New York price reflects a 10-cent greater base price, plus the freight rate?

A. Yes.

Q. So, in selling in Chicago, you have increased the price of the price of the peat moss 10 cents per bale above New York?

A. We haven't increased it; we have made the deduction for New York.

Q. Well, that is what your Company gets? 10 [32] cents less for the bale sold to New York?

A. Yes.

Q. Do you have any knowledge with respect to the competing producers in the region?

A. I am not in a position to say.

Mr. Tolan: I will have a witness who will testify to that.

Q. (By Mr. Tjossem): What, if any, has been the increase in the price per bale of peat moss in your Company, at the present time, as compared with the price in 1935?

A. There is very little relationship one between the other. As a matter of fact, it has been previously stated by the witness representing the sales outlet that the price is much greater; in fact, it is almost doubled. Personally, I am not acquainted with the sales price in 1935.

Q. How long did you say you had been with the Company?

A. Two and one-half years.

Plaintiffs' Exhibit No. 2—(Continued)
(Testimony of Andrew B. Strang.)

Q. Were you with any other peat producer up there prior to that? A. No.

Q. What, if any, has been the increase in the peat moss price within your recollection, within the last two years?

A. I have previously outlined that; 10 cents per bale.

Q. Actually there has been no increase in the last two and one-half years except the 10 cents per bale? A. That is right. [33]

Q. Are you familiar with the complaint that is filed in this action? A. I think so.

Q. Are you familiar with the cars set forth in Appendix A to the complaint?

A. No; I have not paid much attention.

Q. Have you seen Appendix A?

A. No; I have not prior to this.

Q. You testified as to the percentage of production in your Company compared to the total production of peat moss in the British Columbia area?

A. I will say that Atkins and Durbrow, Ltd., produce, roughly, 17 to 20 per cent of the peat moss produced in British Columbia; roughly, one-fifth.

Q. Is that true with respect to the full two and one-half years that you have worked with the Company, or have they increased their production recently?

A. We have increased our production recently.

Q. Did you increase in 1947 over 1946?

A. We did.

Plaintiffs' Exhibit No. 2—(Continued)

(Testimony of Andrew B. Strang.)

Q. Did you increase in 1948 over 1947?

A. No, we have not.

Q. What would be your relative increase in 1947 compared to 1946?

A. I would roughly estimate 50,000 bales. [34]

Q. And your total production in the year 1946 was what?

A. I cannot give you the figures for 1946.

Q. Well, approximately?

A. Well, let us say an increase of 50,000 bales in 1947.

Q. What was the 1947 production?

A. 250,000.

Q. As I understand your testimony, it is that in the year 1946 you had no carry-over going into 1947; is that correct? A. Yes.

Q. And then with this increased production of 50,000 bales, you had a carry-over of from 9 to 10 thousand bales?

A. I should possibly qualify that to say that there were roughly, 1500 bales, which is the normal month's end stockpile.

Q. You would call that a normal carryover?

A. At the end of the month, yes.

Q. With the production of 250,000 bales in the year 1947, you had a carry-over of 10,000 bales in that year? A. Yes.

Q. Now, you mentioned that in 1947 you encountered difficulty in reaching the territory that you define as the Eastern market, and I am going to

Plaintiffs' Exhibit No. 2—(Continued)

(Testimony of Andrew B. Strang.)

accept your definition as being the Eastern Seaboard, the Middle East and Central States. The difficulty that you mentioned, was that which you encountered in the 86 cent rate group; is that correct? [35]

A. The 86 cent rate, I think—well, let me put it this way, that the increase being based on a percentage basis didn't affect the 86-cent zone to the extent that it did the other Eastern zones which already had a higher freight rate.

Q. I think that is a matter of arithmetic; we all know that. I will ask you where you encountered difficulty in 1947; did you encounter difficulty in the 86-cent group destinations?

A. I stated that the greatest percentage of our sales was in the Eastern states where the freight rate is higher, and it adds to the cost of the bale, and where you get into the position of the Eastern producers, you are working at a disadvantage.

Mr. Tjossem: I ask that the answer be stricken.

Emax. Hall: Read that question, Mr. Nelson, please.

(Last question read.)

A. Yes.

Q. (By Mr. Tjossem): Did you encounter some difficulty in 1947 in those zones lying East of the 86-cent group? A. Yes.

Q. When did you first encounter that difficulty?

A. Well, the increases, as I recall, were late in the Fall of 1946. As in all cases where one is sell-

Plaintiffs' Exhibit No. 2—(Continued)

Testimony of Andrew B. Strang.)

ing, it takes some time for the public to react to the increase in prices, but very definitely during the summer and early spring of 1947 we began to notice the discrepancy between our price and those [36] prices of the Eastern producers.

Q. All right. Will you give me the month when you discovered this?

A. I am not in a position to say.

Q. Would you say it was around the month of May 1947?

A. You can call it December, or any month; I don't know.

Q. It was during the spring or early summer?

A. That is correct.

Q. How long has that difficulty continued?

A. It has become evermore increasingly apparent as the increases continue to come along.

Q. You say it is more difficult to sell in those markets, or was more difficult to sell in those markets in May of 1948 than it was in May of 1947, for instance?

A. Yes.

Exam. Hall: Let me understand what the point is here.

When did this general increase become effective?

Mr. Tolan: January 1, 1947.

Exam. Hall: Could you take a typical rate from British Columbia to a typical destination in this Eastern area and give it to me in cents per hundred pounds, or per bale, or whatever way it is applied, on December 31, 1946?

Plaintiffs' Exhibit No. 2—(Continued)

(Testimony of Andrew B. Strang.)

Mr. Tjossem: We will have an exhibit which will give you the entire pattern of the rate.

Exam. Hall: All right. How did you arrive at [37] the 10-cent concession, or whatever you call it? How did you determine it should be 10 cents, or not 12 cents or 14 cents, or something else? How did you select 10 cents?

The Witness: I think the decision of making a discount of 10 cents when bales were sold in those zones was based on the fact that the Eastern producers were generally underselling us by about 10 cents a bale.

Exam. Hall: By the term "Eastern producers," you are taking in a lot of territory. May I ask you, please, whom you consider as the seller who controlled the price? Who made the price, if I may use that term, let us say, in the Eastern territory?

The Witness: Those peat producers shipping from Maine, the Eastern provinces of Canada and the Province of Ontario.

Exam. Hall: And those are the shippers that you considered as making the price?

The Witness: Yes.

Exam. Hall: What freight rates do they pay? Do you know that?

The Witness: No, I don't.

Mr. Tolan: There is an exhibit on that.

Exam. Hall: Of course, you will realize that from Maine to any place in the State of New York,

Plaintiffs' Exhibit No. 2—(Continued)

Testimony of Andrew B. Strang.)

he haul would be considerably less than from British Columbia to New York?

The Witness: We do, sir. [38]

Exam. Hall: And the freight rate naturally would be a whole lot less?

The Witness: Yes.

Exam. Hall: I am a little bit confused as to why this 10 cents comes into the picture, and how it comes into the picture is still not clear to me.

The Witness: Well, may I try once more? When we sell to those zones, the D and E zones, we sell at \$1.85 a bale.

Exam. Hall: Who makes that price?

The Witness: That is our price.

Exam. Hall: \$1.85 a bale. Where is that. F.O.B.?

The Witness: That is F.O.B. Vancouver.

Exam. Hall: All right.

The Witness: Then when we sell to points in Zones A, B, and C,—

Exam. Hall: Let us take Pittsburgh. That would be in Zone A?

Mr. Tolan: Well, let's see,—

Exam. Hall: All right. Let us take Harrisburg. That would be Zone A.

The Witness: \$1.04. When we sell to that zone, we sell at \$1.75; in other words, we knock 10 cents off a bale?

Exam. Hall: Why do you do that?

The Witness: Because of the freight on that bale at that point would be higher than \$1.00,—

Plaintiffs' Exhibit No. 2—(Continued)
(Testimony of Andrew B. Strang.)

Exam. Hall: Higher than \$1.00?

The Witness: Let us say this; that the bale laid down at that plant is going to cost more than it is going to cost at a plant having an 86 cent zone rate.

Exam. Hall: It is obvious there would be a freight difference between 86 cents and \$1.04, which would be 18 cents. Why don't you make it 18 cents?

The Witness: You mean why didn't we reduce our price 18 cents?

Exam. Hall: Yes.

The Witness: The story is all in the financial picture of the Company.

Exam. Hall: And still I am probably not making myself clear. I am wondering, trying to get the thing straight in my mind, just what the picture is. You have stated that Maine, for example if a shipper in Maine, or a producer in Maine ships to Harrisburg, Pennsylvania, would that be done?

The Witness: Yes.

Exam. Hall: Would he ship the same kind of a product?

The Witness: It would be, almost.

Exam. Hall: Would it be as attractive to the purchaser as your product?

The Witness: We always maintain that the best peat moss comes from British Columbia, but so far as the individual is concerned, it is purely a matter of opinion or choice. [40]

Exam. Hall: Would he pay more for your product than he would for the Maine product?

Plaintiffs' Exhibit No. 2—(Continued)

(Testimony of Andrew B. Strang.)

The Witness: Yes, he would.

Exam. Hall: Have you some origin point in Maine that you could use?

The Witness: No, I have not.

Exam. Hall: Does anyone?

Mr. Tolan: The Maine shipping point would be Cherrydale; that would be one; I think the principal shipping point is Columbia Falls, Maine; that is the Maine shipping point.

Exam. Hall: All right; Columbia Falls, Maine. Do you happen to know what the freight rate from Columbia Falls, Maine, to Harrisburg is?

Mr. Tolan: I can make it available. It is 36 cents published basic.

Exam. Hall. All right. That is from Columbia Falls, Maine, to Philadelphia?

Mr. Tolan: And the basic rate from British Columbia would be 90 cents at the same time.

Exam. Hall: There is a difference of 54 cents in freight rate that the man from British Columbia has to pay as against the man from Columbia Falls, Maine, who produces peat. Would that be so much a bale as compared with the man in British Columbia?

Mr. Tjossem: That would be in cents per [41] hundred pounds; you are talking in terms of bales, and I think that should be corrected.

Exam. Hall: How are the rates published?

Mr. Tolan: In cents per hundred pounds.

Exam. Hall: What is the weight of a bale?

Plaintiffs' Exhibit No. 2—(Continued)
(Testimony of Andrew B. Strang.)

Mr. Tjossem: I do not have it.

The Witness: 115 pounds is our average weight.

Exam. Hall: Would that be the same average weight from Columbia Falls, Maine?

The Witness: Yes, they generally produce the same size bale.

Exam. Hall: So, using 100 pounds as the net weight, the man in Columbia Falls, Maine, would have an advantage of 54 cents in freight rate, with which you have to compete?

The Witness: That is right.

Exam. Hall: How do you do that?

The Witness: We discount our bale 10 cents when we sell it in that area.

Exam. Hall: Well, considering the freight rates alone, it still leaves the man in Maine with an advantage of 46 cents?

The Witness: And then, again, we assume approximately 7 cents of the freight account by shipping a bale, which actually weighs about 115 pounds; it has a guaranteed weight of 105 pounds. In short, we have a maximum weight per bale, [42] which is added to the cost of the bale in this area, and the discrepancy of 10 cents a pound is assumed in the,—the discrepancy of 10 cents a bale is assumed in the price F.O.B. British Columbia, and the overcharge on the extra poundage over 100 is assumed.

Exam. Hall: You are getting over my head on

Plaintiffs' Exhibit No. 2—(Continued)

(Testimony of Andrew B. Strang.)

that. Going back to your 86 cent zone; that would be Chicago, Group D?

The Witness: Yes.

Exam. Hall: You don't find it necessary to make a 10-cent concession there?

The Witness: That is correct.

Exam. Hall: Why is that? Wouldn't the shipper from Columbia Falls, Maine, to Chicago have a lower freight rate than from Vancouver to Chicago? Lower by more than 10 cents a hundred pounds?

The Witness: I would think he would.

Exam. Hall: Then why don't you make the same amount of concession there at Chicago?

The Witness: I would assume that the majority of the Eastern peat producers market their products relatively close to the locality where the peat is produced.

Exam. Hall: Is it possible that they could ship their product over the Lakes down the St. Lawrence?

The Witness: Personally I doubt it; I know very little about it, but I don't think any of that moves down the Great Lakes. [43]

Exam. Hall: It is a rail commodity?

The Witness: I think so.

Exam. Hall: Entirely?

The Witness: I think so.

Exam. Hall: I have no further questions. I suppose I will have a few later on.

Plaintiffs' Exhibit No. 2—(Continued)
(Testimony of Andrew B. Strang.)

Q. (By Mr. Tjossem): What price do you make for the Pacific Northwest, at Seattle, for instance?

A. \$1.85, plus freight.

Q. And this \$1.85 basis, plus the freight to get it there, does that also apply to all points in the Pacific Northwest and into California?

A. That is the general policy.

Q. That is what the policy is? A. Yes.

Q. And I think maybe I overlooked asking you to explain a little bit further your present policy of making discounts East of Chicago. As I recall, you said, as you approached the Eastern Seaboard at the present time you are increasingly making reductions in the base price to amounts greater than 10 cents per bale?

A. That premise is incorrect, partly because I was not sufficiently clear. As soon as the shipments in question go into an area having a freight rate [44] in excess of 86 cents, it is a 10 cent discount per bale on it. There is no distinction made between Zones A, B and C; it is simply a straight discount of 10 cents a bale where the freight rate is above 86 cents.

Q. In other words, it is your testimony now as sales in the United States, you have two prices: One which is \$1.75 per bale plus freight to destination, and the other is \$1.85 a bale plus freight to destination? A. That is correct.

Exam. Hall: Again, if I may ask, suppose a shipment went to Fort Wayne, Indiana, or South

Plaintiffs' Exhibit No. 2—(Continued)

(Testimony of Andrew B. Strang.)

Bend, just East of Chicago; would you allow the 10 cents to that station?

The Witness: May I ask what zone that would be?

Exam. Hall: That would be just directly East of Chicago, and I think it would be in Zone C.

Mr. Tolan: 98 cents.

The Witness: Then the bale would carry a 10 cent discount.

Exam. Hall: It would carry a 10 cent discount?

The Witness: Yes.

Exam. Hall: And there is a 12 cent spread in the rates?

The Witness: That is right.

Q. (By Mr. Tjossem): Were you here this morning and did you hear Mr. Pittack testify, from VanWaters and Rogers? A. I was.

Q. Do you sell anything to that Company?

A. We do not. [45]

Mr. Tjossem: That is all I have.

Redirect Examination

Q. (By Mr. Tolan): Are you contending in your testimony here that the rate from Columbia Falls, Maine to Harriburg, talking of basic rates, should be the same as from British Columbia to Harrisburg? A. No, we are not.

Q. So far as the 10 cent allowance is concerned, was that allowance based on the difference in your

Plaintiffs' Exhibit No. 2—(Continued)

(Testimony of Andrew B. Strang.)

base rates or was this allowance based in the difference of the surcharge of the base rates?

A. It was based on the discrepancy on the maximum charge and the percentage increase.

Exam. Hall: Can you illustrate that as to one specific illustration?

The Witness: One shipment in particular?

Exam. Hall: Take what I have been using, Vancouver to Harrisburg or Philadelphia versus British Columbia to Harrisburg or Philadelphia.

Mr. Tjossem: I would like to ask what you mean by surcharge?

Mr. Tolan: Any charges over and above the base rate in effect on December 1, 1946.

Exam. Hall: The witness is evidently not conversant with the details of the freight rates. For [46] the purpose of answering my question, someone here might be able to give those freight rates from Columbia Falls, Maine, to Philadelphia?

Mr. Tolan: This rate for 1946 was 36 cents, and the rate from New Westminster to Philadelphia was 90 cents.

Exam. Hall: That was in 1946?

Mr. Tolan: Yes.

Exam. Hall: How does this surcharge come in? What increase did the 36 cent rate take on January 1, 1947, and what increase did the 90 cent rate taken on January 1, 1947?

Mr. Tjossem: Might I just state, he says he has worked for the Company two and one-half

Plaintiffs' Exhibit No. 2—(Continued)

Testimony of Andrew B. Strang.)

years,—is it not true that this surcharge of 10 cents a bale for the zones East of Chicago, or beyond the Chicago group, were in effect all the time you were working with the Company?

The Witness: I would say, speaking purely from memory, that that 10 cent zone discount was an innovation in the winter of 1946-1947.

Q. (By Mr. Tolan): When in 1946?

A. 1946 and 1947.

Q. Or 1947?

A. It is not too clear in my mind, but I am pretty sure that that 10 cent arrangement was worked out in the winter of 1946-1947.

Q. You mean in the latter part of 1946 or early part of 1947? A. That is correct. [47]

Exam. Hall: Well, now, I am going to get back to my question. I don't want to leave the record open the way it is. As we left it, the rates were 36 cents versus 90 cents as the base rate. Now, I asked you what increase was applied on the 36 cent rate in cents per hundred pounds and what increase was applied on the 90 cent rate?

Mr. Tolan: The 36 cent rate went up 6 cents, and the 90 cent rate went up 18 cents.

Mr. Tjossem: I think you should state how long that continued.

Mr. Tolan: Until December 1, 1947.

Exam. Hall: Now, are you contending that the 90 cent rate should have only gone up 6 cents?

Mr. Tolan: That is correct; exactly.

Plaintiffs' Exhibit No. 2—(Continued)
(Testimony of Andrew B. Strang.)

Q. (By Mr. Tjossem): Would you indicate more particularly what increase was applied on the New Westminster - Philadelphia rate as compared with the Maine rate to Philadelphia? Which adjustment of the basic rate became effective December 1, 1947?

Mr. Tolan: I just gave that. It went up 18 cents from 90 cents.

Mr. Tjossem: I am talking about the charge you mentioned, or the change you mentioned on December 1, 1947.

Mr. Tolan: On December 1st the 6 cent maximum was made applicable; it took from January 1st to December 1st to get that adjustment made in the six cent assessment on that rate. [48]

Exam. Hall: I think I have that straight.

Mr. Tjossem: I have no further questions.

Exam. Hall: Have you any further questions, Mr. Tolan?

Mr. Tolan: No, sir.

Exam. Hall: You are excused.

(Witness excused.)

Mr. Tolan: I will take the stand myself because I have several exhibits I want to introduce.

FRED H. TOLAN
was sworn and testified as follows:

Direct Statement

The Witness: My name is Fred H. Tolan; I am traffic consultant and traffic manager. My office is

Plaintiffs' Exhibit No. 2—(Continued)

(Testimony of Fred H. Tolan.)

1103 Smith Tower, Seattle, Washington.

For the record, I would like to identify this exhibit as Complainant's Exhibit No. 1, which will be offered in evidence, with others.

Exam. Hall: The exhibit will be marked No. 1, Witness Tolan.

(Complainant's Exhibit No. 1, Witness Tolan, marked for identification.)

The Witness: This exhibit shows, in general, the complete scope of the complaint; first, the number of cars involved, 1268; it shows the actual weight of each car, average, 38,182 pounds; it shows the most important shipping point is New Westminster, British Columbia; it shows the shortline mileages [49] to the most important points in California, the two which received the greatest number of shipments being given in Paragraph 4, and the actual route mileage used, in Paragraph 4. The actual mileage has been used rather than a short or trick mileage to give key distances into the Middlewestern area.

Turning to Page 2 of this exhibit, to Paragraph 3, that gives the actual average mileage into the Midwest from New Westminster, British Columbia, using Chicago, St. Louis and Des Moines as the key centers, which gives 2239 miles.

Paragraph 7 takes the basic rate and computes the average actual per car earnings; Paragraph (B) of Section 7 takes the average earnings on the 6 cent maximum increase, and Paragraph (C) takes

Plaintiffs' Exhibit No. 2—(Continued)

(Testimony of Fred H. Tolan.)

the per car earnings on the basic rate plus 20 per cent enhancement on the actual average load of 38,182 pounds, which shows an earning of \$328.36, which was assessed on the Western movement from January 1, 1947 to December 1, 1947.

Paragraph 8 shows the per mile earnings on the basic rate and on the rate sought herein, the 6 cent maximum; Paragraph 9 compares those earnings with the minimum earnings prescribed in the matter listed there under Paragraph 9.

Exam. Hall: Mr. Tolan, when the 6 cent increase was cancelled, and a 25 per cent, or a 20 per cent increase applied to this traffic, did you seek suspension of that change?

The Witness: I am sorry, it did not come up [50] that way. The rates were published with a fertilizer increase of 6 cents; later we found out, sometime, some considerable time after the shipments had begun to move, that the 6 cent maximum was not being protested, and that, instead, the full 20 per cent was being assessed on peat moss shipments out of British Columbia. Therefore the matter didn't come to our attention until, it was actually nearly three months,—it was nearly three months before we found that the 20 per cent was being assessed rather than the 6 cents.

Exam. Hall: Before Mr. Strang left the stand, I got the impression that it was conceded, or that someone stated that for about two months in late 1946, or early 1947, the six cent rate had been ap-

Plaintiffs' Exhibit No. 2—(Continued)

(Testimony of Fred H. Tolan.)

plied for about a month, and then that was cancelled?

The Witness: No. Base rates were increased to a flat 20 per cent rate from January 1st.

Exam. Hall: Do you recall that conversation right about the close of Mr. Strang's testimony?

The Witness: I heard him mention the date of December 1, 1947.

Exam. Hall: Well, on December 1, 1947, was there a general percentage increase applied to the rate from Vancouver or New Westminster?

The Witness: On December 1, 1947 into the Middlewestern area there was a decrease—not an [51] increase. The 20 per cent surcharge which had been assessed up until that time was replaced with a six cent maximum.

Exam. Hall: On December 1, 1947?

The Witness: That is right.

Exam. Hall: Now, on January 1, 1947, was that the date the general increase became effective?

The Witness: That's right.

Exam. Hall: And from January 1, 1947 to December 1, 1947, from New Westminster to the territory West of Chicago, did you or did you not have a six cent maximum increase applied?

The Witness: We did not have the six cent maximum from January 1 to December 1 of 1947.

Exam. Hall: You had the 20 per cent?

The Witness: Yes.

Exam. Hall: Then on December 1, 1947, you

Plaintiffs' Exhibit No. 2—(Continued)

(Testimony of Fred H. Tolan.)

got a six cent maximum increase from December 1?

The Witness: To December 1, 1947,—would you read that, Mr. Reporter?

Exam. Hall: What I am after, when did you get the six cent maximum increase applied to this traffic? When did you first get it?

The Witness: May I ask that that question be withheld for a moment, and I have another exhibit here which I think will eliminate all the questions that you have suggested.

May I identify this as Complainant's No. 2? [52]

Exam. Hall: It will be marked as Complainant's 2, Witness Tolan.

(Complainant's Exhibit No. 2, Witness Tolan, marked for identification.)

The Witness: This is a breakdown of the 1268 cars, by territories. We had to break it down by territories because of the rate changes involved in this matter were by territories. Taking the territory in Section 1 of this exhibit of groups A, B and C,—all of them East of Chicago. Incidentally, the allocation of cars by states are given above the rates, and directly under the caption of Paragraph (1); there were 138 cars, or 11% of the total number of cars involved in this case, which went into Official Territory. The basic rates A, B, and C are given in the first column, 90 cents, 87 cents, and 84 cents.

On January 1, the carriers assessed a full 20 per cent increase on the 90 cent rate, making it

Plaintiffs' Exhibit No. 2—(Continued)

(Testimony of Fred H. Tolan.)

\$1.08. On October 13, 1947, the Commission gave its first order in the second round of rate increases, Ex Parte 166, so that \$1.08 was subject to an additional 10 per cent surcharge; that brought the rate up to \$1.188, to Group A. On January 5, 1948, the 10% surcharge on the rate, which became effective on October 13, was cancelled, and in lieu of that 10%, the rate of \$1.08 was subject to a 20% surcharge; that was the second supplemental order in the second round of rate increases. That [53] brought the rate up to \$1.296.

On February 1, 1948, the Eastern carriers finally concurred in the six cent maximum on British Columbia produced peat, and the rate on February 1st became 90 cents plus a 6 cent maximum, which became published at 96 cents, plus a 20% surcharge which went into effect on January 5. The total of those brought the rate up to \$1.152; and then on May 6 of this year, the Interstate Commerce Commission granted that 6 cent maximum on fertilizer, and the carriers voluntarily, on short notice, made the 8 cent maximum applicable on peat by tariff publication. So in May of this year the rate became \$1.04. I would like to direct the attention of the Examiner particularly to the fact that today the \$1.04 rate is substantially less than the rate that was charged during the year 1947, in spite of the other increases that have gone into railroad rate making.

I would like to emphasize one thing under Para-

Plaintiffs' Exhibit No. 2—(Continued)

(Testimony of Fred H. Tolan.)

graph (1); the 6 cent maximum into Eastern territory did not go into effect until February 1, 1948.

Exam. Hall: Well now, you spoke of a 6 cent maximum. Taking your Paragraph (1) of Exhibit 2 and applying that to Group A. Considering only the Group A by itself, the basic rate was 90 cents?

The Witness: That's right.

Exam. Hall: Prior to January 1, 1947? [54]

The Witness: That's right.

Exam. Hall: Now, on that date, effective January 1, 1947, something went into effect to Chicago, and apparently from this exhibit it was 18 cents increase, — a 20% increase, — pardon me; into Group A?

The Witness: That is right.

Exam. Hall: Now, was that 18 cent increase effective by a so-called master tariff?

The Witness: It was.

Exam. Hall: And that was a 20% increase?

The Witness: Yes.

Exam. Hall: Now, you come to October 13, 1947, and apparently you add onto that another increase of 10.8 cents?

The Witness: 10%; it was 10% of a \$1.08 rate.

Exam. Hall: Well now, let me ask you, on January 1, 1947, this 20% increase, was that a temporary increase or was it a permanent increase?

The Witness: It was a nationwide, permanent increase. It was incorporated in the rate structure at that time; it was not temporary.

Plaintiffs' Exhibit No. 2—(Continued)

(Testimony of Fred H. Tolan.)

Exam. Hall: It was by order of the Commission?

The Witness: In Ex Parte 162.

Exam. Hall: Now, on October 13, 1947, what was the authority for that increase?

The Witness: That was the first temporary order in Ex Parte 166. [55]

Exam. Hall: Then on January 5, 1948, they got a further increase?

The Witness: That was a temporary order; that is the second supplemental order.

Exam. Hall: Both temporary orders?

The Witness: Yes.

Exam. Hall: And then on February 1, 1948, you got a reduction, apparently?

The Witness: On February 1, 1948, the tariff was changed,—the basic published rate was changed to read not 90 cents, but was published to read 96 cents, not subject to Ex Parte 162, which knocked out the 20% increase.

Exam. Hall: In February 1948, did that occur as an order of the Commission?

The Witness: No; that occurred as an action of the Standing Rate Committee at Chicago in response to a plea by myself for the Complainants in this case.

Exam. Hall: You referred to a maximum increase in that rate of,—

The Witness: Six cents.

Exam. Hall: Over what?

The Witness: Over the 90 cent rate in effect

Plaintiffs' Exhibit No. 2—(Continued)

(Testimony of Fred H. Tolan.)

prior to January 1, 1947. Those rates were subject to the still outstanding orders in Ex Parte 166, [56] and therefore that 96 cent rate was subject to a 20% surcharge under the second supplemental order in Ex Parte 166 issued in January 1948.

Exam. Hall: January 5, 1947?

The Witness: January 1, 1947.

Exam. Hall: That was in Ex Parte 162?

The Witness: 162 was January 1, 1947.

Exam. Hall: Your contention centers around 162 rather than 166?

The Witness: That is right. Everything in this application is directed to 162. 166 has to come in incidental to 162. All of this case is addressed to 162.

Exam. Hall: Now, if I should take 90 cents on Group A on January 1, 1947, what is it that you contend should have been added to that?

The Witness: Six cents.

Exam. Hall: Six cents?

The Witness: That is correct.

Exam. Hall: And then you plus that by the 20% or whatever increases were authorized in 162?

The Witness: Yes.

Exam. Hall: And you finally get what?

The Witness: The rate you get, with the 90 plus 6 plus 8; we don't want it changed in the present rate.

Exam. Hall: That is the rate that was published May 6, 1948? [57]

Plaintiffs' Exhibit No. 2—(Continued)

(Testimony of Fred H. Tolan.)

The Witness: May 6, 1948; that is correct. I want to direct the Examiner's attention particularly to the fact that it was not until February 1, 1948 that the six cent maximum was incorporated into the tariff. That is an important date to remember.

Turning then to Section 2 of this exhibit, we have a shipment into Southern territory, and there there is the extremely small amount of traffic, only 29 cars, 2% of the total. The base rate published effective on December 31 is shown there, taking the C territory South of the Ohio River, 84 cents.

Exam. Hall: Well now, without going into a detailed discussion of that exhibit, does the same situation apply there as you have said was applicable to Official Territory, except the rates differ?

The Witness: There is one other basic point. The six cent maximum was not incorporated into the rate structure until March 29, 1948. You will recall it was February 1, 1948. In the Southern territory it was not until March 29, 1948.

Exam. Hall: It took the Southern territory a little longer to make up their minds?

The Witness: The concurrences from the Eastern lines were not made effective; the Southern lines never did change their tariffs to include the six cent maximum. The way the six cent maximum came in was that tariff 162,—the master tariff,—was amended effective March 29, 1948, to provide [58] a six cent maximum. So, as long as the rates

Plaintiffs' Exhibit No. 2—(Continued)

(Testimony of Fred H. Tolan.)

were subject to that master tariff, we paid the six cent maximum there, on May 29.

Turning now to Page 2 of the exhibit,—that is Page 2 of Exhibit No. 2,—which is the C-1 area and west to Mountain Pacific Territory,—covering the Midwestern and Southwestern area,—we have a total of 554 cars, which, to the total of all cars, is 44%.

Exam. Hall: That is all shown on the exhibit?

The Witness: Let me emphasize on this exhibit, that it was December 1, 1947 that the six cent maximum was incorporated in the tariff. We paid a full 20% from January 1st until December 1st into the Middlewestern area.

Exam. Hall: And then on December 1st you got the benefit of the six cent maximum that you were claiming?

The Witness: That is right.

Turning to Paragraph (4), which is the Mountain Pacific Territory, or the area west of the Rocky Mountains, including Montana, there were 547 cars in the Mountain Pacific Territory, or a total of 43% of the total.

Now, I would like to introduce an exhibit for identification showing the carloads of peat from British Columbia to California only.

Exam. Hall: That will be Exhibit 3.

(Complainant's Exhibit No. 3, Witness Tolan, marked for identification.) [59]

The Witness: The last paragraph of Exhibit No.

Plaintiffs' Exhibit No. 2—(Continued)

(Testimony of Fred H. Tolan.)

2 refers to Mountain Pacific Territory. This breaks down the shipments into the largest consuming State in the Mountain Pacific Territory. California received 455 cars. This exhibit shows every one of the towns which received cars, together with the number of cars received, and we follow the same basic procedure that we used in the other exhibits, particularly referring to Exhibit No. 2. The base rates are shown in the column under the heading of "Basic Rate." The 20% increase is shown in Column 2. The 20% increase plus the first temporary order in Column 3, and Column 4 is one of the important columns of this exhibit. On January 1, 1948, the carriers changed the tariff and published new rates not subject to the master tariff of 162. In those new rates they did, at the request of myself and possibly others, include the six cent maximum into Southern Territory, but in the Northern California rates, particularly in the San Francisco Bay area, the new rates as published January 1, 1948, included a full 20% increase.

I want to emphasize that Southern California on January 1, 1948, got the full six cent maximum. The San Francisco Bay area and Northern California, and those points related to that adjustment, were charged the full 20%. One of the aspects of this complaint is for the Commission to order the American carriers to carry the six cent maximum into that territory. [60]

Plaintiffs' Exhibit No. 2—(Continued)
(Testimony of Fred H. Tolan.)

Exam. Hall: Who published the tariff of the American carriers?

The Witness: The American Carriers, Mr. J. P. Haynes. It is identified on the last page of the exhibit.

Exam. Hall: Now, just take the first item on Exhibit 3, Bakersfield.

The Witness: Right.

Exam. Hall: What is it that you are claiming as reparations on shipments to Bakersfield? What period and what rate?

The Witness: We contend that we should have a rate for the shipments involved, and listed on the complaint,—that we ought to have a rate of 72 cents plus 6 cents, making it 78 cents. Any shipment which moved subsequent to the temporary emergency surcharges would be subject to those surcharges.

Exam. Hall: Amplify that a little further. You have a 72 cent rate shown on there to Bakersfield?

The Witness: That is right.

Exam. Hall: Effective, apparently, December 31, 1946, or that is when it was in effect?

The Witness: That is right.

Exam. Hall: Now, according to your statement you are asking an order requiring the carriers to make reparations down to a basis of 78 cents. What period would that be for?

The Witness: That would be for the period from January 1, 1947, to October 15, 1947. [61]

Plaintiffs' Exhibit No. 2—(Continued)
(Testimony of Fred H. Tolan.)

Exam. Hall: During that period you want 78 cents instead of 86.4,—94.6 and 86 cents, respectively?

The Witness: That is right.

Exam. Hall: After that, what are you claiming?

The Witness: From October 13 until,—I don't believe there are any shipments after January of this year,—after January 15 we want 78 cents plus 10%.

Exam. Hall: That would be 85.6?

The Witness: That is correct; 85.6.

Mr. Tjossem: Up to what date?

The Witness: Up to December 1, 1947. I don't believe any shipments moved in the year 1948.

Exam. Hall: Now, is it or is it not your position that the Commission's order required the carriers to publish the rates that you are asking?

The Witness: Right. The next exhibit will bring that out.

Mr. Burkett: Suppose some shipment moved to Bakersfield; would you be requesting any different rate after January 1, 1948, rather than 78 cents plus 10%?

The Witness: I think that is irrelevant to the issues, because the rates subsequent to January 1, 1948, are not involved. However, I would answer by saying that we would take whatever the general increases of the Interstate Commerce Commission granted.

Plaintiffs' Exhibit No. 2—(Continued)

(Testimony of Fred H. Tolan.)

Exam. Hall: Well, the rates are not involved after December [62] 31, 1947?

The Witness: That is right.

Exam. Hall: Would it be true of the whole territory covered by the complaint? Would that be true?

The Witness: That is correct.

Exam. Hall: So that we can forget anything after December 31, 1947?

The Witness: Yes; that is right, because there would be no shipments made which are involved in this complaint.

Exam. Hall: That is, so far as reparations are concerned. How about the situation for the future?

The Witness: Into Northern California, we would only want the Commission's attention directed to 162; we want the six cent maximum. Any increases after that date are adequately taken care of in the present tariff.

Mr. Burkett: Isn't it a fact that in this present proceeding we are not concerned with 166 increases at all?

The Witness: No, with one exception. Any reparations which are granted in this proceeding where the rate is reduced to the six cent maximum, the surcharge under Ex Parte 162 would be on the reduced basis. Aside from that, 166 does not enter into these proceedings at all.

Mr. Burkett: In that case, in the case of the exception to which you referred, there would simply

Plaintiffs' Exhibit No. 2—(Continued)

(Testimony of Fred H. Tolan.)

be the applicable 166 increases on the rate including the six cent maximum under [63] 162?

Mr. Tjossem: In other words, if the carriers had applied the six cent maximum when the 162 came down, the case would not be here today?

The Witness: Definitely. I was very surprised that there was an issue on it.

Mr. Tjossem: Then the issue is because the carriers did not, on January 1, 1947, apply the six cent maximum on peat, and until they so applied it; and so far as it has not been applied, that is the complaint that you have against the carriers, solely and completely?

The Witness: With the one exception of the rate into the San Francisco Bay area.

Mr. Tjossem: I think you have outlined that.

The Witness: Even that would not be an issue if the base rate had been left in, because the master tariff 162 was changed to provide a six cent maximum, but by the time the carriers published the page, making it not subject to the master tariff, we were not able in the San Francisco Bay area,——

Exam. Hall: It seems to me, the way you have recited it, the San Francisco carriers will have the burden to explain it; however, it seems to me that something needs justification or explanation as to why the different basis was applied to Southern California than to Northern California. That is separate and apart from the general question of compliance with [64] 162.

Plaintiffs' Exhibit No. 2—(Continued)
(Testimony of Fred H. Tolan.)

Mr. Burkett: All I want to say is that we will present the explanation.

Exam. Hall: I will say this, it will have to be a pretty strong explanation, in my opinion, to convince me that you should have a different basis for Northern California than for Southern California. It just does not seem like sense to me to divide California into two sections.

Mr. Tjossem: In that connection, you must understand that that movement is wholly from British Columbia points.

Exam. Hall: I understand the movement is from British Columbia points, but it is from British Columbia to Southern California as well as to Northern California. I think we could simplify this case a whole lot if we could stick to 162, and have some kind of an understanding that whatever way the Commission goes on 162 will control the question of the increases on 162, because, as Mr. Tolan states, he is seeking nothing after the 166 order came out, provided they had been applied on what he considers a proper 162 increase; is that correct?

The Witness: That is exactly right, and we would so stipulate.

Mr. Tjossem: I think you will find the railroad exhibits are predicated upon 162, and the confusion is the injection by Mr. Tolan of his exhibit on 166. The issues of the complaint, [65] as I understand them, as drawn by the Complainant, in so far as

Plaintiffs' Exhibit No. 2—(Continued)

(Testimony of Fred H. Tolan.)

they state a meritorious allegation, are confined to the carriers handling of rate increases in 162.

The Witness: In answer to that, there is no way to avoid bringing in Ex Parte 166, because of the lap-over into the temporary rate order period.

Exam. Hall: Because you had been charged the improper 162 increases compounded by the 166 increases?

The Witness: That is exactly it.

Exam. Hall: And that is why you had to bring it in here?

The Witness: That is right.

Exam. Hall: If the carriers would agree that in the event the Commission should find that they improperly applied the 162 increases, they would go back and apply the 166 increases and recompute the increases for the whole period.

Mr. Tjossem: I think the statements of the Examiner and Mr. Tolan have clarified it. I think we understand it.

Mr. Tolan: Shall I proceed?

Exam. Hall: Yes.

The Witness: I would like to identify for the record another exhibit dealing with the carloads of peat from British Columbia to the Mountain Pacific territory, stating rates in cents per 100 pounds.

Exam. Hall: That will be identified as Complainant's Exhibit No. 4. [66]

(Complainant's Exhibit No. 4, Witness Tolan, marked for identification.)

Plaintiffs' Exhibit No. 2—(Continued)
(Testimony of Fred H. Tolan.)

The Witness: On Exhibit 2 we break down the Mountain Pacific Territory and set forth the shipments into the Mountain Pacific Territory. In Exhibit 3 we showed the shipments going into California.

In Exhibit 4 we complete the picture of the Mountain Pacific Territory, and this is one picture that requires a tremendous amount of mental gymnastics to keep up with the rate changes. I would just sketch it briefly for the record.

Exam. Hall: Why do we have to go into all that if the sole and primary question here is the proper application of increases under 162?

The Witness: We will gladly dispense with it, because I believe it adds very little probative value to the record that has not already been brought in directly or by implication with the other exhibits. There is one thing I would like to point out, and that is this, taking, for instance, Phoenix, Arizona; there is a 72 cent rate from New Westminster to Phoenix, which applies equally to New Orleans. On December 1, 1947, that rate from New Westminster to all the Middlewestern and Southwestern Territory became 72 plus six, or 78 cents. However, we could not get the change that we sought in that regard until March 17, 1947, when the 6 cent maximum was included. So we were paying more for hauling it to Phoenix from [67] New Westminster than we were paying for the same to the Southwestern Territory.

Plaintiffs' Exhibit No. 2—(Continued)

(Testimony of Fred H. Tolan.)

I think no further explanations are necessary. There are no changes in the dates the maximum six cent increase became effective, and I will pass it.

Exam. Hall: You can handle that in your brief.

The Witness: May I identify this next document as Complainant's Exhibit No. 5. It is a statement of pertinent data relative to the 6 cent maximum increase on peat from the Interstate Commerce Commission's Decision in Ex Parte 162.

Exam. Hall: It will be identified as Complainant's 5, Witness Tolan.

(Complainant's Exhibit No. 5, Witness Tolan, marked for identification.)

The Witness: We have alleged that this matter could properly be determined under Section 6, with the proper increase to apply during the entire period under controversy; that is, that it should have been a six cent maximum. The reason we feel that is brought out by Exhibit No. 5. Exhibit No. 5, the first paragraph of it, has a direct quotation from the Order of the Interstate Commerce Commission in Ex Parte 162.

Paragraph 2 lists the authority for the groupings that we use. Paragraph 3,—I would like to call particular attention to Paragraph 3, Appendix 1 to the Order, "Fertilizers, n.o.s, including Potash—Group 640; Diatomaceous or Infusorial [68] Earth—Group 701; Twenty per cent, subject to a maximum of 6 cents per 100 pounds, or \$1.20 per net ton."

Plaintiffs' Exhibit No. 2—(Continued)
(Testimony of Fred H. Tolan.)

Mr. Tjossem: I do not think it is necessary to burden the record with matters that can be set out in the particular appendix,—

Exam. Hall: That may be all right, and I would not permit a reading of this whole quotation from the Commission's report into the record, but I do want Mr. Tolan to at least make one observation as to what his contention is with respect to that Order. The rates just pointed out, fertilizers, set forth in Group 640; is that correct?

The Witness: That is correct.

Exam. Hall: And that 640 was in the Order?

The Witness: This Paragraph 4 of this exhibit, on Page 2,—I might say the underscoring is all mine.

Mr. Tjossem: I would like to have it understood that that is not testimony. It is a statement of counsel, and, as such, I have no objection to it.

Exam. Hall: He is a witness; he is under oath.

Mr. Tjossem: These are all matters that are reported.

Exam. Hall: I am not talking about the quotation from the Commission's decision.

Mr. Tjossem: Paragraph 3 is also a quotation from the Commission's decision.

Exam. Hall: Well, I know, but I want to get the opinion [69] from the witness as to how they interpret or construe the Commission's decision. That is going to be helpful to me.

Mr. Tjossem: As I understand, what you are

Plaintiffs' Exhibit No. 2—(Continued)

(Testimony of Fred H. Tolan.)

asking, is the opinion of counsel on how he interprets the Order. I have no objection if it is understood as such.

Exam. Hall: I realize that the Commission finally will have to determine and interpret its own Order, but the point that I have made here is that, to save me the trouble from reading through the decision and going over a lot of stuff, which I otherwise won't have to read, if I can get a clear statement at this point with respect to the contention of Mr. Tolan, it would be helpful. I think I see it now, and I don't think we need to bother with this exhibit any further.

The Witness: In execution of that Order, I would like to read into the record how the rates were published so that the record will be complete and show the problem of interpretation. In purported compliance with the Commission's Order in 162 the carriers published, Agent Kipp, ICC A3657, Ex Parte 162, Item 107.

Mr. Tjossem: Now, just a moment. I would like to simplify this by asking if phraseology is that of the witness?

The Witness: What is that?

Mr. Tjossem: "Purported compliance of the Order."

The Witness: That was my statement.

Mr. Tjossem: I ask that that be stricken from the testimony. [70] If you will confine your testimony to what you contend the carriers did.

Plaintiffs' Exhibit No. 2—(Continued)
(Testimony of Fred H. Tolan.)

The Witness: Let me state what the carriers did. On January 1, 1947, they published the following:

"Fertilizer and articles listed in tariff making reference to this tariff, as and when taking fertilizer rates, Table 1, apply Table 1 maximum 6 cents per 100 pounds or \$1.20 per net ton."

The interpretation given by the carriers of that item was that as peat was carried in the tariff without a caption of "Fertilizer," it did not thereafter entitle itself to a 6 cent maximum.

Exam. Hall: That is a question of argument.

The Witness: In spite of the fact that the Commission Group,—

Exam. Hall: That is argument.

Mr. Tjossem: That is what I was leading up to.

Exam. Hall: You can argue that in your brief, just as well as trying to get it into the record this way. May I ask if the tariff that you quoted is nationwide?

The Witness: Yes. The next statement I would like to offer is a statement showing the effect of X 162 increases on peat rates.

Exam. Hall: That will be identified as Complainant's 6, Witness Tolan. [71]

(Complainant's Exhibit No. 6, Witness Tolan, marked for identification.)

The Witness: Complainant's Exhibit 6 brings out the net effect of this Order in regard to the competition, and I think it will do a great amount

Plaintiffs' Exhibit No. 2—(Continued)

(Testimony of Fred H. Tolan.)

to clarify the testimony of Mr. Strang this morning. Let me go down this exhibit and describe what it says.

Exam. Hall: Don't go down all the exhibit, because it is plain on its face, and anyone can read it; but you might take one typical point.

The Witness: Comparing the first two there; taking the British Columbia shipments to Chicago, Illinois. The base rate is 72 cents, and a 20 per cent increase raised the rate 14 cents; that was an increase of 8 cents over the 6 cent maximum. To Cincinnati, the same procedure was followed, and you can go across to Troy, New York, Philadelphia and St. Louis.

Exam. Hall: That is plain on the exhibit.

The Witness: Now, turn to No. 2, Columbia Falls, Maine, which is a shipping point for the principal peat producing area in Maine. The base rate was given in a tariff authority, and the increase under their surcharge in the East, in Eastern Territory, under Ex Parte 162 was 25 per cent, due to the greater revenue needs of the carriers in that territory. Their increase would have been without the 6 cent maximum, 11 cents. Therefore, their rates were reduced by 5 cents by having the [72] 6 cent maximum. The same theory follows across to all of the principal producing points which are covered by Page 1 of this exhibit.

Page 2 takes a few Manitoba points and compares them with Middlewestern points.

Plaintiffs' Exhibit No. 2—(Continued)
(Testimony of Fred H. Tolan.)

We have asked the Interstate Commerce Commission to prescribe what we think to be the correct rates into the San Francisco Bay area. The rates into California are carried in this one item in the tariff referred to here in the first line of this exhibit, which I would like to identify as Exhibit 7.

Exam. Hall: That will be identified as Complainant's 7, Witness Tolan.

(Complainant's Exhibit No. 7, Witness Tolan, marked for identification.)

The Witness: The first column shows the basic rate as published in the tariff; the second column shows the present rates, and the third column shows what we desire the Commission to prescribe as the through rate on this peat from British Columbia to the California areas involved. Where we have put no change, you will find it to be the Southern California area; they have already included the 6 cent rate maximum in their application. The only rate changes sought in that column, which you will find, are set forth there.

Exam. Hall: Those are points which you refer to as the San Francisco Bay area? [73]

The Witness: Yes.

Exam. Hall: And the other area in Southern California, you have no complaint about that, other than 162?

The Witness: No complaint at all at the present time.

Plaintiffs' Exhibit No. 2—(Continued)
(Testimony of Fred H. Tolan.)

Exam. Hall: No complaint with respect to Southern California?

The Witness: For the future.

Exam. Hall: What have you for the past?

The Witness: The same thing as was brought out.

Exam. Hall: Under 162?

The Witness: 162. Identically the same as the other areas enumerated. I believe the exhibit is self-explanatory.

Exam. Hall: What you are asking the Commission to do with respect to the rates in the future to San Francisco from British Columbia producing points is what? I notice you have a rate of 64 cents there?

The Witness: We request the Commission to order the Defendants to publish a 64 cent rate subject to the increases in Ex Parte 166.

Exam. Hall: Would that be the December 31, 1946 rate of 58 cents increased by 6 cents?

The Witness: Yes.

Exam. Hall: And compounded by the Ex Parte 166 increases?

The Witness: Yes.

Exam. Hall: Would that be true of all the other points shown on the exhibit? [74]

The Witness: Yes.

Mr. Burkett: Would that be from the Canadian border or from the Canadian producing points?

Plaintiffs' Exhibit No. 2—(Continued)
(Testimony of Fred H. Tolan.)

The Witness: We are asking it from the Canadian producing points.

Exam. Hall: You are asking the Commission to prescribe a 64 rate from the Canadian producing points to San Francisco?

The Witness: Yes, that is right, if, in their opinion, they can do so; if, in their opinion, they cannot prescribe rates North of the Border, we are asking that they prescribe what rates they deem necessary from the American carriers from the Border to eliminate the violations of the Act.

Exam. Hall: What rate would you think would be proper from the American side of the Border to San Francisco?

The Witness: I would say, if it had to be prescribed from the Border, the 64 cent rate, subject to Ex Parte 166, should be prescribed on the basis of the existing divisions of this rate. If, for example, the Canadian carriers got 10 per cent, it should be reduced accordingly.

Exam. Hall: We have nothing to do with divisions?

The Witness: Then I would put it on a mileage basis, the 64 cent rate, or such percentage of that distance as is within the United States should be prescribed from the Border.

Exam. Hall: Have you got the distances on the exhibit?

The Witness: No, sir; I have not. [75]

Exam. Hall: The Commission could not very

Plaintiffs' Exhibit No. 2—(Continued)

(Testimony of Fred H. Tolan.)

well make a mileage distribution of the rate unless it has the distances.

The Witness: The distances are in tariffs on file with the Interstate Commerce Commission, and under Rule 80; I did not bring that in. However, it was strictly an oversight.

Exam. Hall: Assuming, of course, that the Commission would not have jurisdiction to prescribe a through rate from British Columbia to San Francisco, as representative of the San Francisco Bay points, but would have the jurisdiction to prescribe a rate on the American section of that movement from the American side of the British Columbia Border to San Francisco, what rate would you suggest, in cents per hundred pounds, should have been prescribed on January 1, 1947?

The Witness: For example, figuring that the mileage is 95 per cent within the United States, I would request that the rate from the Border be 95 per cent of the 58 cents, subject to the additional 6 cents.

Exam. Hall: I asked you about January 1, 1947. Is that the date 162 went into effect?

The Witness: That is correct.

Exam. Hall: Then your suggestion would be 95 per cent of 64?

The Witness: There is a technical problem there, the adjusting of the 6 cent maximum.

Exam. Hall: I am just now confining it to the date of [76] January 1, 1947. I am not going be-

Plaintiffs' Exhibit No. 2—(Continued)

(Testimony of Fred H. Tolan.)

yond that. Any rate going into effect in the future would have to be built up compounded by 166 increases?

The Witness: That is right.

Exam. Hall: With that understanding, then what would your suggestion be as to the rate to be prescribed for the specific date of January 1, 1947, in compliance with the order in Ex Parte 162?

The Witness: From the Border only?

Exam. Hall: Yes.

The Witness: I would still compute that, sir, at the mileage pro rata; assuming 95 per cent of the mileage was within the United States,—I don't know what the exact mileage is,—but assuming 95 per cent of the mileage is in the United States, I would take the 58 cent rate and take 95 per cent of that, and then add 6 cents to the rate, getting your total rate.

Exam. Hall: How would you publish that? As a proportional rate?

The Witness: I would publish that as a proportional; it would be a part of a through movement; there is no peat produced at the Border to be moved. Therefore it would have to be a proportional.

Exam. Hall: Suppose the Canadian railroads would not cooperate and they decided to increase the rates, and leave you [77] where you are?

The Witness: That is one of the difficulties of International Law, or International rate-making.

Plaintiffs' Exhibit No. 2—(Continued)

(Testimony of Fred H. Tolan.)

One answer to that is, we are not selling the poultry litter in California; you can only pad a rate so far, and I believe the commercial necessity would force them to make a restoration of the rate.

I have one sheet exhibit which sets forth the tariffs in which peat is carried under the caption of fertilizer.

Exam. Hall: That will be identified as Complainant's Exhibit 8, Witness Tolan.

(Complainant's Exhibit No. 8, Witness Tolan, marked for identification.)

Exam. Hall: I think Exhibit 8 is self-explanatory, and I don't think it needs any comment, does it?

The Witness: May I make just one, because it was brought out by counsel for the Defendants. Counsel for the Defendants stated that in this area peat is never treated as a fertilizer. We direct the Examiner's attention to Paragraph 7, in which the rates are definitely flagged "fertilizer," and under that heading we will find peat.

This covers rates from British Columbia as well as rates in the North Pacific Coast Freight Bureau tariff.

Exam. Hall: All right. Proceed to the next.

The Witness: The next exhibit is a letter which I received from Mr. Van Court, August 26, 1947, of the Southern Pacific Railway. [78]

Exam. Hall: That will be identified as Exhibit 9, Witness Tolan.

Plaintiffs' Exhibit No. 2—(Continued)
(Testimony of Fred H. Tolan.)

(Complainant's Exhibit No. 9, Witness Tolan, marked for identification.)

The Witness: This letter is a report of the rate application by the Standing Rate Committee in Chicago. I direct particular attention to the underscored portion on Page 2 of this exhibit. This exhibit was filed as a result of conversations between myself and the Standing Rate Committee, and correspondence between myself and the 162 Tariff Interpretations Committee. The Interpretations Committee ruled that the problem was particular to the Pacific Northwest and was not particular to other peat producing area, and therefore suggested that the matter should be handled as a rate application rather than as an interpretation of Ex Parte 162. Later, however, effective March 29, 1948, the Tariff Interpretations Committee reversed themselves and published a 6 cent maximum in tariff 162, but from January 1, 1947, until March 29, 1948, the 6 cent maximum was not applicable in the master tariff. This is a conclusion of the Standing Committee in Chicago with respect to why the 6 cent maximum should be applied on peat.

Mr. Tjossem: I ask that all this testimony with respect to this exhibit be stricken. The Examiner stated the issue to be whether the carriers did or did not comply with the orders issued in Ex Parte 162; what some Standing Committee did [79] or what somebody in the railroad had to say about it, I don't think makes any difference.

Plaintiffs' Exhibit No. 2—(Continued)

(Testimony of Fred H. Tolan.)

The Witness: Mr. Examiner, counsel seems to think that the entire case is addressed to Section VI. I would like to point out that there are Section I and Section III violations also alleged.

Exam. Hall: That is enough. I don't want any more observations on either side about that. I want to read this document before I make a ruling. My ruling will be that this exhibit can stay in the record. I might say that it is rather noncommittal; I don't think it supports the general question one way or another, except to show that the matter had been brought to the Standing Committee of the railroads and they concluded, for reasons of their own, to give the article the fertilizer rate; but there is nothing in here that I see that deals with the interpretation of the order. That Committee does not express any opinion one way or the other, as I see it. However, I will leave that in the record.

The Witness: The next exhibit is a four-page document from the Central Freight Association, Chicago, on the subject of peat, noibn, ground or not ground, CL, EB; Transcontinental rates.

Exam. Hall: That will be identified as Complainant's 10, Witness Tolan.

(Complainant's Exhibit No. 10, Witness Tolan, marked for identification.) [80]

The Witness: This is a further report of the Central Freight Association on the same subject, in which they considered this in relation to traffic within their own area. I would draw particular atten-

Plaintiffs' Exhibit No. 2—(Continued)

(Testimony of Fred H. Tolan.)

tion to the underscored portion on Page 4 of this exhibit.

Mr. Tjossem: I take it, from the statement of the witness, that this is a similar document to Exhibit 9, and I would like to make the same objection, and I assume it would be overruled on the same grounds, but I would like to have the record show I still object to it. By the way, Mr. Tolan, who signed this letter?

The Witness: I don't know who signed it, because it was a formal report from the Central Freight Association; the letter was simply sent out without any signatures, I believe.

Mr. Tjossem: That is, the Central Freight Association?

The Witness: What happens is that the Standing Committee makes recommendations; that was the recommendation that they made, which they put forward to the Eastern lines; the Central Freight Association in granting their concurrence made this ruling, which is my Exhibit 10.

Exam. Hall: Where did you get this?

The Witness: It was mailed to me from the Central Freight Association in reply to my request. We were urging them all the time to get some action, to prevent injury in the future,—

Exam. Hall: This was not signed? [81]

The Witness: It is a clerical error if it was not signed. It is a matter of public record.

Exam. Hall: I see what it is.

Plaintiffs' Exhibit No. 2—(Continued)

(Testimony of Fred H. Tolan.)

Mr. Tjossem: I don't think it is properly received in evidence.

Exam. Hall: I will receive it in evidence because it shows that the carriers have been confronted with this situation and have been considering it.

Mr. Tjossem: We will admit that; if it is for the purpose of showing that the carriers are considering it, we will admit that. If the matters therein contained are merely for the purpose of showing consideration, we have no objection to that; but if it is offered for the purpose of showing the verity of the matters therein, we have objection.

The Witness: I want to point out that the action has been resolved into a tariff publication; so it does have the additional weight of having been resolved to real action.

Exam. Hall: All right. I will overrule the objection and leave the exhibit in.

The Witness: Complainants offer Exhibit 1 to 10 in evidence at this time.

Exam. Hall: All right. Subject to the objections so far registered, and subject to cross examination, Exhibits 1 to 10 will be received in evidence.

(Complainant's Exhibits 1 to 10, inclusive, Witness Tolan, [82] received in evidence.)

Exam. Hall: Off the record.

(Discussion off the record.)

The Witness: That concludes my direct examination.

Plaintiffs' Exhibit No. 2—(Continued)
(Testimony of Fred H. Tolan.)

Cross Examination

Q. (By Mr. Tjossem): Mr. Tolan, I will ask you to refer to your Appendix A of your complaint, and on Line 13 of the first page of the Appendix you show a movement from New Westminster to Webster, South Dakota? A. Yes.

Q. The routing is shown as BCE-CPR-Q-CMStP&P. I would take it, from the routing to the destination, that the initial movement on that shipment was by CPR, which connects with the Soo Line in the Midwest; isn't that correct?

A. I would not know without perusing the bill of lading and the freight bill on it.

Q. Do you assert now the routing shown on that Appendix 1 is incorrect?

A. No. But you ask me to tell where the car was interchanged, and I am not in a position to do that, but I would speculate it was at the Canadian Border.

Q. About how far from the Pacific Coast, approximately? A. I don't know.

Q. Would it be in Montana?

A. I would imagine it would be interchanged at Portal or Noyes. [83]

Q. Will you refer to your Appendix, on the same page, origination, South Fraser Street, and destination Pittsburgh, Kansas, and the routing shown on GN-DWP-CStPM&O-MoP. Do you know where the Canadian lines would interchange?

Plaintiffs' Exhibit No. 2—(Continued)

(Testimony of Fred H. Tolan.)

A. Well, likely at Duluth. Well, it would be anybody's guess.

Q. On Line 31, you have a car originating at South Fraser Street, destination Mercer, Missouri, and the routing is CN-DWP-CStPM&O-CRIP. I presume that the first "CN" means "GN," or Great Northern. Do you know whether that would be interchanged at Duluth with the Canadian carriers?

A. There are all matters of pleadings on record, and what possible value can that have?

Exam. Hall: Don't argue with counsel. Just answer the question.

Mr. Tjossem: I just cite those as examples of numerous shipments which are in the complaint here.

Q. (By Mr. Tjossem): What relief are you seeking as to the charges made when the Canadian carrier takes the product from the British Columbia area to Duluth, and from there delivery is made into the Middle Northwest by the American carrier? What relief do you expect from the Interstate Commerce Commission?

A. If that is a Section VI violation, complete relief without exception. If it is not a Section VI violation, then the only thing the Interstate Commerce would order is that [84] which they could legally do, and it would be based on the divisions within the United States. Rather, the distance within the United States.

Plaintiffs' Exhibit No. 2—(Continued)
(Testimony of Fred H. Tolan.)

Q. I take it that it is your contention, if it's a Section VI violation, that you can get the full reparations on those movements that you are requesting?
A. That is right.

Q. Will you refer to your Exhibit 1, on Page 2, Sub-paragraph 9. You have a statement there, "Minimum car mile earnings on all trans-continental carload traffic moving on minimum weights of 40,000 lbs. or less." Then you say, on basic rates, 10 cents per car mile, all freight. What do you mean by the statement, "all freight?"

A. That is referred to in my former statement, it applies to all freight carried in the same tariff that carries the peat moss rate.

Q. In other words, the earnings figures there have not been based upon any per mile earnings,—they do not reflect any actual earnings on any commodity by the carrier Defendants here?

A. No; it is the minimum that is described in the item referred to in Section 9, Page 2, my Exhibit 1.

Q. Will you explain that a little further. What comparison are you trying to make in your Exhibit 9,—in your Sub-paragraph 9, Exhibit 1? [85]

A. I think the matter is clear when you look at Section 8. We show the rate on basic movement, the fact that the car mile rate on the basic movement is 12.14 cents. In the item we refer to, the Commission has prescribed the aggregate rates on a minimum less than 40,000 pounds, and that the aggregate

Plaintiffs' Exhibit No. 2—(Continued)

(Testimony of Fred H. Tolan.)

could not apply if that were less than 10 cents per mile,—per car mile.

Q. In other words, the 10 cents per car mile is the very bottom the carriers will permit; the car cannot move for less than 10 cents per car mile?

A. How is that?

Exam. Hall: I think it is an order of the Commission under the fourth section application, that the carriers cannot go below that, or they will have an unlawful rate; that is, less than the out of pocket cost?

The Witness: That is right.

Q. (By Mr. Tjossem): And that is the only comparison that you are asking to make, or seeking to make in that sub-paragraph of Exhibit 1?

A. Yes.

Q. Now, will you turn to Exhibit No. 2. It may be that that has been explained in view of the statements made in the application of the 166 increases, but I would like to ask one question with respect to the rates that you show under your paragraph No. 1, Group A. I have gone through your Appendix [86] 1 to your complaint, and I find therein no rate which exceeds \$1.08 per 100 pounds. Is my observation correct, that in no instance where you assessed a rate in excess of \$1.08 on the shipments as set forth on Appendix 1 to the complaint?

A. I can answer that voluminously or succinctly, this way: That there are no rates assessed over \$1.08 in Appendix No. 1, unless the shipment was

Plaintiffs' Exhibit No. 2—(Continued)
(Testimony of Fred H. Tolan.)

made subsequent to October 13, 1947; in such instances would be \$1.08 plus 10 per cent. Do you wish me to go through the Appendix?

Q. I couldn't find any, and I was just wondering.

A. That may be true; or it may not be.

Q. The point I am making is this, so far as seeking reparations in the trans-continental territory,—that is, the rates in columns C, D, and E, have no bearing on the issue?

A. What do you mean? The January 1st, February 1st and May 6th rates?

Q. That's correct.

A. Definitely, they have. Unless you go back to what we stipulated off the record. The six cent maximum was not incorporated into the rate picture until February 1st of 1948, and therefore we paid on the full 20 per cent basis rather than the six cent maximum basis on all shipments which moved before February 1, 1948. That is why those extra columns are in there. I think the last column is to show the present rate is lower than the rates that were assessed in October, 1947. [87]

Exam. Hall: You have no complaints about the present rates?

The Witness: That's right.

Q. (By Mr. Tjossem): That is the point I am making. You have no complaint about the present rates?

A. No.

Q. You are complaining about the \$1.08 rate,

Plaintiffs' Exhibit No. 2—(Continued)

(Testimony of Fred H. Tolan.)

and then you show under Column C, D and E rates in excess of \$1.08, which were in effect for a while; and assuming my statement is correct with respect to Appendix No. 1, that in no instance does it show a rate charged in excess of \$1.08, and in view of the fact that you have no complaint about the present rates, is there any significance to the columns set forth, that is, C, D and E?

A. Answering that question, unless there are no shipments which moved subsequent to October 13, 1947, then your statement is right; but if there are shipments that moved in there subsequent to October 13, 1947, then your statement is wrong. I can check the record, if you would like to have me do so.

Exam. Hall: The answer is plain, that if the Appendix does not show any shipment charged more than the rate of \$1.08, then the columns have no significance?

The Witness: That is correct.

Q. (By Mr. Tjossem): That is what I have been asking.

A. That is right. [88]

Q. That would be true,—again leaving out the Northern California points,—that would be true with respect to each rate shown on the exhibit, and if that is true, those columns would have no significance here.

A. I think there is one point being overlooked in this statement, and that is, that the statement is to show when the 6 cent maximum came in. Otherwise, you can see that we would be protesting the present

Plaintiffs' Exhibit No. 2—(Continued)

(Testimony of Fred H. Tolan.)

rates, as we are into California. Obviously, we intend to protest the 20 per cent basis in California, and we could not do so unless we did so to other sections of the country. Therefore, this exhibit is designed not only to show the varying rates, but to direct the attention of the Commission to the great spread in the dates when the 6 cent maximum was incorporated into the rate structure.

Q. In the various rate territories?

A. Yes. Exhibits 3 and 4 are in there for the dual purpose.

Q. In so far as the rates stated in the Columns C, D and E exceed any rate applicable to the destination or origin groups therein shown,—exceed the highest rate charged to the same point in Appendix 1, the level of the rates have no significance in this hearing?

A. With the additional information I just brought out.

Exam. Hall: Don't repeat.

Mr. Tjossem: I think that is clear enough.

Q. (By Mr. Tjossem): Now, will you turn to your Exhibit 6. As [89] I understand this Exhibit, you have made certain comparisons between the rates, for example, between British Columbia points and Chicago, showing the increase that was made in those rates immediately after the effective date of the 162, and compared the effective rate of 162 from Columbia Falls, Maine, to the same point; is that correct?

A. Yes.

Plaintiffs' Exhibit No. 2—(Continued)

(Testimony of Fred H. Tolan.)

Q. Do you know the distance from New Westminster, for example, to Chicago, Illinois?

A. That is in Appendix No. 1. That is the actual distance, in conjunction with the Great Northern-Northwestern; it is 2,239 miles; that is the actual route mileage.

Q. What is the mileage from Columbia Falls, Maine, to Chicago, Illinois?

A. I would guess it is probably 1200 miles, but that would be just a guess.

Q. Do you know the mileage from the point in Quebec, in Column 3, Line 3,—from there to Chicago?

A. I am not familiar with the Canadian rail geography as much as I am with the American rail geography. It is very difficult to estimate the mileage.

Q. Do you know the mileage from any of the other points in Canada to the named destinations on any of the other lines up to and including Line 8 on Page 2? A. No. [90]

Q. Do you know, Mr. Tolan, whether there is an actual movement of peat moss from Columbia Falls, Maine, to Chicago, Illinois?

A. Other witnesses will bring that out; personally, I do not.

Q. And that is the same as to all of the points shown on 2 to 8, inclusive, of this exhibit?

A. That is correct.

Q. Do you assert that the relationship in rates,

Plaintiffs' Exhibit No. 2—(Continued)

(Testimony of Fred H. Tolan.)

for example, between New Westminster and Chicago,—that the basic rate is 72 cents as shown by the exhibit, and that such rate was reasonably related to the 45 cent rate from Columbia Falls to Chicago?

A. No; I made no such allegation.

Q. Do you have any idea whether such basic rates were reasonably related?

A. What do you mean by reasonably related?

Q. In other words, the relationship is on a basic rate before Ex Parte 162 took effect? As I understand the exhibit, there was a 72 cent rate from New Westminster to Chicago, and at the same time there was a 45 cent rate from Columbia Falls, Maine, to Chicago. Would you say that those rates were properly adjusted, one to the other?

A. I would not know until I had made a detailed analysis. The only thing I can say is that both rates were long standing.

Q. Do you know whether the rates were prescribed by the Interstate [91] Commerce Commission or published by the carriers.

A. The rates from Columbia Falls, Maine, were prescribed by the Commission; and the peat moss rate was prescribed by the Commission in the Eastern fertilizer rate; peat moss in that case was taking the fertilizer rate.

Q. How about the British Columbia rate to Chicago; was that prescribed by the Commission?

Plaintiffs' Exhibit No. 2—(Continued)

(Testimony of Fred H. Tolan.)

A. Not to the best of my knowledge. I am quite certain it was not.

Q. At what point do you make your comparison? Let me put it this way. I take it from your exhibit that, in order to make the comparison that you do, do you not have to assume that the rates as shown therein, comparing the rates from British Columbia to the destination, with the rates from Maine to destination, and the Canadian points named to destination, under the base rates, were properly adjusted or have you considered the impact of the 162 increase as making an unreasonable adjustment of the rates?

A. Will you rephrase that; I don't think I can follow you.

Exam. Hall: I think you can answer it by saying that you took the rates as you found them, and that you took them as properly related?

The Witness: I would adopt that statement?

Q. (By Mr. Tjossem): Now, will you turn to your exhibit No. 7. In response to the Examiner's question as to what rates you are proposing from British Columbia points to Northern California, [92] as shown in this exhibit, I recall that you made the statement that you are seeking through rates from the Canadian point to the Northern California destination, provided the Commission had the authority to prescribe them; is that correct?

A. Yes.

Q. I notice your exhibit, as it is now framed, is

Plaintiffs' Exhibit No. 2—(Continued)
(Testimony of Fred H. Tolan.)

based on rates from British Columbia producing points to the California destinations?

A. That is right.

Q. Do I understand that you are amending your exhibit?

A. That was brought out through Examiner Hall, in which I said that if the Commission does not have the power to prescribe a through rate from the producing point in British Columbia to San Francisco, using that as an example of Northern California rates, then we ask that any rates that could be established be established from the Border on a milegae basis.

Q. All right. I want to come down to that. It seems to me, in qualifying your exhibit that way, you do not have any proposed rates from the Border to these Northern California destinations?

A. I might suggest that that testimony is as much a part of the record as the exhibit.

Q. As I recall, you did not give the Examiner a definite answer on what your proposal is, and I want to know if you are making a proposal, and if I understand what your proposal is; if [93] Exhibit 7 is amended so that in the event it is found the Commission cannot prescribe from the origin to the California destinations, in that event you are requesting the rate therein set forth to be reduced by deducting from the rate, as therein shown, the percentage figure of the rate, which percentage figure

Plaintiffs' Exhibit No. 2—(Continued)

(Testimony of Fred H. Tolan.)

is derived by determining the percentage of Canadian haul to the total haul?

A. That is a rather long way of saying what we want. As I understand it, if I correctly understand you, it could be phrased much more simply.

Q. Let us put it on a concrete standpoint. If, for example, the rate that you are seeking to San Francisco is 64 cents, and the mileage from the Border to San Francisco is 95 per cent of the mileage from the Canadian origin to San Francisco, the rate that you seek and which you are now proposing is 95 per cent of 64 cents per 100 pounds?

A. That is not exactly the way I put it to Examiner Hall. I would take the base rate of 58 cents, and take 95 per cent of that, using that as an example of the mileage; I would use 95 per cent of the 58, figuring it down to the nearest round cent, and then I would add 6 cents to it.

Q. That is your contention in the event the Commission finds it cannot prescribe through rates from the Canadian origin to destination?

A. That's correct. [94]

Mr. Tjossem: That is all I have.

Exam. Hall: That seems to be all.

(Witness excused.)

Mr. Tolan: I will call Mr. Carnicroff.

Plaintiffs' Exhibit No. 2—(Continued)

E. E. CARNCROFF

was sworn and testified as follows:

Direct Examination

Q. (By Mr. Tolan): Will you please give your name? A. E. E. Carncroff.

Q. What is your address?

A. 1485 Douglas, New Westminster, British Columbia.

Q. What company are you connected with?

A. I am with the Western Peat Company.

Q. What is your position with that Company?

A. Managing Director.

Q. How long have you been with that Company?

A. Since 1929.

Q. Do you act in any capacity with the peat industry, other than as a managing director of the Western Peat Company?

A. I have an unofficial capacity, at times as a spokesman for the Canadian Peat Association.

Q. Would you outline very briefly the amount of production at your plant, and the area in which you operate?

A. We are producing at the present time,—let me explain that we have three or four plants. We have a combined production [95] of about 500,000 bales of peat moss. We ship into British Columbia, into the Canadian territory, practically all over the United States, with the exception of East of the Mississippi River, where we ship very little.

Plaintiffs' Exhibit No. 2—(Continued)

(Testimony of E. E. Carnicroff.)

Mr. Tjossem: Is that testimony on behalf of the Association or the Western Peat Company?

Mr. Tolan: Western Peat Company only.

The Witness: That's right.

Q. (By Mr. Tolan): How do you market your peats in the Midwestern territory?

A. We have distributors in that territory.

Q. Do you sell f.o.b. Westminster, or do you sell at delivered?

A. We sell delivered.

Q. Do you have any production by your Company in the East?

A. We have an operation in Shippegan, New Brunswick.

Q. Have you seen Complainant's Exhibit No. 6, listing Columbia Falls, Maine, and other places in the East?

A. Yes.

Q. Is there any movement from those towns into the areas that you ship into?

A. I do not know the movement out of Columbia Falls. Columbia Falls is apparently the shipping point for the operations in Cherryvale, Maine.

Q. Do you know what the movement is out of Shippegan, New Brunswick? [96]

A. Yes. Last year there were approximately 60,000 bales out of Shippegan.

Q. Do you know of any movement out of Port Colbourne?

A. I know there is a movement; I do not know what the movement is.

Q. Do you know how it moves?

Plaintiffs' Exhibit No. 2—(Continued)

(Testimony of E. E. Carnicroff.)

A. There is a movement from Riviere Du Loup to Duluth; there is ready to move at the minute 250,000 bales.

Q. Do you know how many bales of peat moss you produce at your plant in British Columbia per year?

A. We produce between 450 and 500 thousand bales.

Q. Do you sell all the peat that you produce?

A. Well, you better get the dates; sometimes we do, and sometimes we have a holdover.

Q. Take the year 1946?

Mr. Tjossem: Where?

Q. (By Mr. Tolan): In British Columbia?

A. Yes. All but a small amount that we normally carry over.

Q. About how much is that?

A. Approximately 15 to 20 thousand bales.

Q. How do you produce your peat there? By the artificial drying method or the sun drying method?

A. Sun drying method.

Q. Can you schedule your production to your sales?

A. Only within limits. We operate on time factors and on [97] weather, and we have to anticipate sales so that when we start a production cycle, we anticipate that next year we will have so many thousand bales of peat moss. So that it is very difficult to schedule the production to the sales, if there is much variance.

Plaintiffs' Exhibit No. 2—(Continued)

Testimony of E. E. Carneroff.)

Q. You have testified that you sold all your production in 1946? A. That's right.

Q. Did you sell all your production in 1947?

A. All with the exception of probably a carry-over of 20,000 bales. I might say that these carry-overs are a deliberate action on our part.

Q. Have you had any loss and damage claims on any shipments that you have made?

A. Very, very few. We may have had over the last three years; we may have had 10 claims.

Q. Would you say they are significant or insignificant?

Mr. Tjossem: I'll object to that as wholly ambiguous. If he tells us what it was, the Commission can determine.

A. You mean the amount of the claims?

Q. (By Mr. Tolan): Against the railroads?

A. We have never made a dollar's claim since we have been in business.

Q. Do you have to use the best quality cars for peat shipments East, or can you use any type of closed equipment? [98]

A. We can use any type of closed equipment, provided it has the cubic capacity.

Q. And the cubic capacity is governed by what?

A. We have to meet the minimum weight requirements.

Q. Have you experienced buyer resistance in the Middlewest during the year 1947?

A. Buyer resistance in the Middlewest,—in the

Plaintiffs' Exhibit No. 2—(Continued)

(Testimony of E. E. Carnicroff.)

Spring of 1947, the buyers were, using the term, cranky; and then in the Fall of 1947, we had a definite outbreak of buyer resistance.

Q. And did it affect your sales?

A. It definitely affected our sales.

Q. Have you raised your price on peat bales at New Westminster within the last two or three years?

A. No, we have not changed the price, except that there may have been minor changes to make adjustments.

Q. Have your costs of production gone up?

A. They have risen rather sharply in the last two years.

Q. Why weren't your prices raised when the costs of production were increased?

A. We have reached the point in our delivered price of peat moss where we figure that the consumer is paying all the traffic will bear, and the minute those prices are increased we get consumer resistance, and, as a result, get decreasing sales of the peat moss. As a matter of fact, I might enlarge [99] upon that; I think the consumer is paying too much for his peat moss now; he is not getting value for it.

Exam. Hall: That is, no matter where he gets it?

The Witness: Let me qualify that. It is on the longer hauls. The consumer in the State of Washington is getting value for his money.

Q. (By Mr. Tolan): An earlier witness, Mr.

Plaintiffs' Exhibit No. 2—(Continued)

(Testimony of E. E. Carneroff.)

Pittack, testified with reference to the use of horticultural peat. Did you hear his testimony?

A. Yes.

Q. Does peat have any value for the soil?

Mr. Tjossem: Just a minute. I don't know that this man is qualified as a soil expert or analyst.

Exam. Hall: Let us find out what he knows about it.

Mr. Tolan: Strike the question, and I will lay a foundation.

Q. (By Mr. Tolan): Have you made a study of the effect of peat on soil conditions? A. Yes.

Q. How long have you made that study?

A. I have made that study ever since 1928. I would say that I have the best library on the subject of peat of anybody in the country, that is, in Canada; I have a complete library, and I have everything that I have been able to get on the subject. I have a fairly complete library of American and [100] Canadian publications.

Q. Now, Mr. Carneroff, what is the effect of peat on soil conditions, when properly applied?

A. As Mr. Pittack testified this morning, it has the effect of making adobe soil pliable and mellow. It has the effect of making some of the clay soils also mellow. It has the effect, in sandy soils, of enabling such soils to hold large volumes of water. The peat is mixed into the soil; it holds water like a sponge; and the little rabbit hairs, they seem to

Plaintiffs' Exhibit No. 2—(Continued)
(Testimony of E. E. Carnicroff.)

reach out and get hold of the water, just like a sponge.

Q. Are you familiar with the importations of peat into the United States? A. Yes.

Q. Does the Department of Agriculture classify horticultural peat as fertilizer?

Mr. Tjossem: I'll object to that. What the Department of Agriculture classifies it, is certainly not an issue in this proceeding.

Exam. Hall: I think we should have the Department of Agriculture publications so classifying it, but if this man knows the answer, he may answer.

A. That was the subject of litigation; there was some court litigation in 1940, and it was ruled by the court at that time that horticultural moss was fertilizer.

Exam Hall: What court? [101]

The Witness: The ruling came out of the Customs Court in New York.

Mr. Tjossem: I submit that was made for the purpose of applying duty, obviously, and it has no bearing on what the commodity is, and it has no bearing on the issues, and I think it should be stricken.

Exam. Hall: Well, I will sustain the objection. We will get into a long discussion here which I don't think is necessary.

Mr. Tolan: You may cross examine.

Plaintiffs' Exhibit No. 2—(Continued)
(Testimony of E. E. Carncroff.)

Cross Examination

Q. (By Mr. Tjossem): You testified with respect to Exhibit 6, and to the past movement from peat moss from some of the points therein named. As I understand, you testified with regard to some movement from Riviere, shown on Lines 3 and 4, and that there was ready to move a quarter of a million bales of peat moss? A. That's right.

Q. That is a movement this year?

A. That is this year's crop that has been prepared and is under cover.

Q. You didn't give any testimony as to what, if any, did move in the past?

A. I would have to guess.

Q. I don't want you to guess. [102]

A. I don't have the complete figures on that.

Q. Now, as to shipping in New Brunswick. I think you testified there was a movement there.

A. I have accurate knowledge of our own plant here.

Q. And that was a movement to Chicago, Cincinnati, Detroit, and such places? You know that would move from Shippegan, New Brunswick to those points? A. No.

Q. What do you know?

A. We move through the Eastern states, to a wide variety of points. I don't know specifically, offhand; I did not come specifically prepared to name any points there.

Plaintiffs' Exhibit No. 2—(Continued)
(Testimony of E. E. Carneroff.)

Q. That point,—Port Colbourne, Ontario. What knowledge do you have have of any rates shown there to destinations in the United States?

A. I am not familiar with it; I know there is a movement is all.

Q. Do you know whether there is a movement to Detroit, for example? A. I don't know that.

Q. Do you know whether there is a movement to St. Louis? A. I do not know.

Q. How about the points shown on Lines 7 and 8 on Page 2? Do you know whether there is a movement from Manitoba to Chicago?

A. Yes; there are about 40,000 bales of peat moss there.

Q. That are going to move? [103]

A. Yes.

Q. How about last year?

A. There were about 25 or 30 thousand bales of peat moss moved.

Q. To Chicago?

A. No; it moved into the Midwestern territory.

Q. Was there any movement to Kansas City from there? A. There undoubtedly was.

Q. Do you know?

A. No, but I know the distributor there, and I know he handles a lot of peat moss in Kansas City. If he did not do so, it would be a miracle.

Q. What percentage of your product shipped out of British Columbia is fine ground and what is coarse ground?

Plaintiffs' Exhibit No. 2—(Continued)

(Testimony of E. E. Carnicroff.)

A. Approximately 60 per cent is fine ground and 40 per cent coarse ground.

Q. You testified with respect to decreasing sales when you raised your prices. Does that take place as to both types of peat moss, both the fine and the coarse ground? Do you find that buyer resistance as to both types, that you testified to?

A. Partially, and partially not. With respect to the coarse ground peat moss, the buyer is much more touchy than the buyer of the fine ground moss. That is, the buyer of the fine ground moss is usually a city man who wants to put in a lawn, and he is not so touchy in the pocket as the poultry man is.

Q. From your knowledge of the use of peat moss on land, would [104] you say that peat moss adds any food to the soil? A. It is negligible.

Q. The actual effect is the conditioning of the soil rather than adding food for the plants?

A. That is the case.

Q. And by conditioning the soil it aerates and helps the soil to retain the moisture?

A. That's right.

Q. The testimony that you gave as to the method of handling the peat moss was confined to your own Company? A. That's right.

Q. In other words, you testified as to the movements and production of the Western Peat Company? A. That's right.

Mr. Tjossem: I have nothing further.

Plaintiffs' Exhibit No. 2—(Continued)
(Testimony of E. E. Carneroff.)

Redirect Examination

Q. (By Mr. Tolan): I have one question. You testified you have a shipping point in Eastern Canada? A. Shippegan, New Brunswick.

Q. Are you a member of the Canadian Peat Association in British Columbia? A. Yes.

Q. Do other members have plants in the East?

A. Other members of the Association?

Q. Yes. [105] A. To my knowledge, no.

Q. Then you are the only member that has a plant outside of British Columbia, who is a member of the Canadian Peat Association of British Columbia, you having a plant in New Brunswick?

A. That is correct; Shippegan, New Brunswick.

Exam Hall: Where is Shippegan?

The Witness: Shippegan is right in the very Northeastern tip of New Brunswick.

Exam. Hall: For example, take a rate from Shippegan to New York. The basic rate is shown on this Exhibit #6 as 42 cents. There is also a basic rate shown from British Columbia points as 90 cents to New York. Now, do you ship from both of those points to New York?

The Witness: We have shipped to New York; we do not make it a practice. Any shipments that were put into New York were accommodation shipments; that is, someone was stuck there and we had a carload and we sold it to him; we sell very little peat moss East of the Mississippi River.

Plaintiffs' Exhibit No. 2—(Continued)

Testimony of E. E. Carneroff.)

Exam. Hall: Take Chicago. Do you ship to Chicago from both points?

The Witness: We have not shipped any moss from Shippegan to Chicago, but we readily could.

Exam. Hall: Do you have any idea what would be the distance from Shippegan to Chicago, versus New Westminster to Chicago, approximately? [106]

The Witness: I would say about 2200 miles from here to Chicago, and to put it at a guess it would be 2 or 14 hundred miles from Shippegan to Chicago.

Exam. Hall: There is somewhere around 1,000 miles difference in your haul?

The Witness: That is correct.

Exam. Hall: Now, you have a 54 cent basic rate from Chicago,—from Shippegan to Chicago, and a basic rate of 72 cents from New Brunswick,—New Westminster to Chicago. Could you use both of those rates?

The Witness: Yes.

Exam. Hall: Would it be practical for you to make all your shipments from Shippegan instead of from New Westminster, if you wanted to fill your Chicago orders?

The Witness: No, because we have not got far enough into the matter of production there.

Exam. Hall: How about your production at Shippegan?

The Witness: We have this year had about 45,000 bales.

Exam. Hall: Suppose you had an order in Chi-

Plaintiffs' Exhibit No. 2—(Continued)

(Testimony of E. E. Carnicroff.)

cago for 20,000 bales. You could ship that to Chicago at 54 cents?

The Witness: Yes.

Exam. Hall: I was just wondering, as a matter of argument,—entirely aside from the tariff question,—you might well make the argument that a shipper at Columbia Falls to Chicago, with a basic rate of 45 cents as compared with a shipper at New [107] Westminster to Chicago with a rate of 72 cents, would have an advantage. That, if each of them got a six cent increase, percentage-wise the man at Columbia Falls would be paying a relatively higher rate than the man from British Columbia?

Mr. Tolan: May I make a comment?

Exam. Hall: I am just leaving it here for what it is worth. You can put that in your brief. You are excused.

(Witness excused.)

Mr. Tolan: That completes the Complainants' case at this time.

Exam. Hall: All right. We will hear from the Defendants.

Mr. Tjossem: I was going to say that I intended to make a statement before I put on our case, but I think the discussion between counsel and the Examiner has pretty well clarified our position. I will call Mr. Rathbun.

Plaintiffs' Exhibit No. 2—(Continued)

H. G. RATHBUN

was sworn and testified as follows:

Direct Examination

Q. (By Mr. Tjossem): Will you state your name, address and occupation?

A. H. G. Rathbun; Claim Investigator for the Transcontinental Freight Bureau, 307 Union Station, Seattle, Washington.

Q. Are you stationed in Seattle? A. Yes.

Q. Did you make an investigation to determine the relative [108] density or weight per cubic foot of various fertilizers as compared with the weight per cubic foot of peat moss? A. I did.

Q. When did you make that investigation?

A. I weighed some of the fertilizer on September 3 and I weighed some yesterday, November 9. The peat moss, I got the weight from the track scales.

Q. Did you make an exhibit showing your method of ascertaining the weight per cubic foot, and outlining the procedure that you followed?

A. Yes.

Q. And the results you obtained? A. Yes.

Mr. Tjossem: May that be marked for identification?

Exam. Hall: That will be Exhibit 11.

(Defendants' Exhibit No. 11, Witness Rathbun, marked for identification.)

Q. (By Mr. Tjossem): Handing you what has

Plaintiffs' Exhibit No. 2—(Continued)

(Testimony of H. G. Rathbun.)

been marked for identification as Exhibit #11, I will ask you what that is?

A. That is my detail of the weights taken here in Seattle on fertilizer versus peat moss.

Q. Do I understand from the exhibit that you actually weighed the sacks and noted down these weights under the columns showing gross?

A. Yes. [109]

Q. You then show the number weighed, and the average weight? A. Yes.

Q. And you show then the number of cubic feet in each sack?

A. As nearly as I could measure it by getting a full sack. It is not square.

Q. But you did it as closely as you could?

A. Yes.

Q. And what did you find?

A. It ranged from 57.37 pounds per cubic foot to 86 pounds for fertilizer.

Q. As stated in pounds per cubic foot?

A. Yes.

Q. What did you ascertain with respect to peat moss?

A. We took four carloads from New Westminster to Seattle, 360 bales to the car. We took the average weight of those, and the measurement is, in inches, 21x19x39 for the bale, and we figured the number of cubic feet, and it worked out 11.5 pounds per cubic foot. That measurement on that bale will not cover all bales, because there are various types,

Plaintiffs' Exhibit No. 2—(Continued)

(Testimony of H. G. Rathbun.)

some with lesser capacity and some with larger. But I was informed by Mr. C. H. Lilly, or one of his men, that that was a good average.

Q. You did the work yourself? A. Yes.

Mr. Tjossem: You may cross examine. [110]

Cross Examination

Q. (By Mr. Tolan): Do you know of any movement of superphosphate from British Columbia to the Midwest?

Mr. Tjossem: I'll object to that as improper cross examination; he has not testified to any movement of anything.

Exam. Hall: I think the objection is well taken.

Mr. Tolan: No further questions.

Mr. Tjossem: I offer the exhibit.

(Defendants' Exhibit No. 11, Witness Rathbun, received in evidence.)

Mr. Tjossem: That's all.

Exam. Hall: You may stand aside.

(Witness excused.)

Mr. Tjossem: I will call Mr. Anderson.

O. M. ANDERSON

was sworn and testified as follows:

Direct Examination

Q. (By Mr. Tjossem): Will you state your name and occupation for the record, please?

A. My name is O. M. Anderson; I am Assistant

Plaintiffs' Exhibit No. 2—(Continued)

(Testimony of O. M. Anderson.)

General Freight Agent of the Great Northern Railway, located at 402 Great Northern Railway Building, Seattle, Washington.

Mr. Tolan: I will admit the qualifications of Mr. Anderson.

Q. (By Mr. Tjossem): Mr. Anderson, are you familiar with the complaint filed by the Complainants in this proceeding? [111] A. I am.

Q. Have you examined into the rates to the transcontinental territory from the points of origin here? A. Yes.

Q. Do you have a statement in connection with those rates? A. Yes.

Q. You may proceed.

A. Before I proceed, I would like to identify the exhibits which I have here. The first one, which will be No. 12, I believe?

Exam. Hall: No. 12.

The Witness: That is a chronological statement of rates on peat and peat moss, as described in Item 5915 Agent L. E. Kipp's ICC 1527 from North Pacific Coast origins to Eastern lettered group destinations.

(Defendants' Exhibit No. 12, Witness Anderson, marked for identification.)

The Witness: The next is a chronological statement of rates on fertilizers and fertilizer compounds, with the tariff authority set forth there from North Pacific Coast origins to Eastern lettered group destinations.

Plaintiffs' Exhibit No. 2—(Continued)

(Testimony of O. M. Anderson.)

(Defendants' Exhibit No. 13, Witness Anderson, marked for identification.)

The Witness: And No. 14 will be a statement showing rates in effect January 1, 1947, on peat and peat moss from New [112] Westminster, British Columbia, Named in Kipp's ICC No. 1527 to representative points in transcontinental groups showing revenue per car and per car mile.

(Defendants' Exhibit No. 14, Witness Anderson, marked for identification.)

The Witness: No. 15 is a statement showing rates in effect January 1, 1947, on dried blood and tankage, described in Item 4540, sulphate of ammonia, nitrate of calcium, manufactured fertilizer and fertilizer, NOS, described in Item 4545, and animal manure, described in Item 4550 of L. E. Kipp's ICC 1527 from Seattle, Washington, to representative points in transcontinental groups, showing revenue per car and per car miles.

(Defendants' Exhibit No. 15, Witness Anderson, marked for identification.)

The Witness: And Exhibit No. 16, a statement showing rates in effect January 1, 1947, on dried blood and tankage, described in Item 4540, Sulphate of ammonia, nitrate of calcium, manufactured fertilizer and fertilizer, NOS, described in Item 4545, and animal manure, described in Item 4550 of L. E. Kipp's ICC 1527 from New Westminster, B. C., to representative points in transcontinental groups, showing revenue per car and per car miles.

Plaintiffs' Exhibit No. 2—(Continued)
(Testimony of O. M. Anderson.)

(Defendants' Exhibit No. 16, Witness Anderson, marked for identification.) [113]

Q. (By Mr. Tjossem): Will you outline the history of the rates set forth in Exhibit No. 12?

A. The Complainants involved in these proceedings are attacking the rates charged on peat from British Columbia points to points throughout the United States. In this testimony I will deal with the transcontinental portion of the complaint.

An examination of Appendix consisting of 37 sheets attached to the complaint develops that there were approximately 726 carloads to transcontinental territory. Exhibit 12 shows a chronological statement of rates on peat and peat moss, from North Pacific Coast origins, including British Columbia, to the Eastern transcontinental lettered group destinations. The transcontinental grouping has been substantially the same for a long period of time. The present grouping and that in effect since October 1st, 1945, is named in North Coast Territorial Directory No. 40-J, L. E. Kipp's ICC No. 1516. The commodity rates on peat moss are those named in Item 5915 of L. E. Kipp's ICC 1527 and apply upon peat NOIBN, ground or not ground. The term NOIBN means "Not otherwise indesced by name" in Western Classification nor otherwise specified in any other item of that tariff carrying the eastbound carload commodity rates between the same points.

The Western Classification described commodity peat NOIBN, ground or not ground, in packages,

Plaintiffs' Exhibit No. 2—(Continued)

Testimony of O. M. Anderson.)

Also carloads loose with the rating of Class "D", minimum 30,000 pounds. There is no [114] carload commodity rate upon peat or peat moss in East-bound Transcontinental Tariff 2-P, L. E. Kipp's CC 1527 other than the rates named in Item 5915 of that tariff.

The commodity rates to territory Group D and West were published effective April 2, 1936, in order to enable the British Columbia producers to meet the competition in the Chicago area and the Middle West with imported peat moss from Sweden and Germany. The imported product was being delivered at Gulf and Atlantic ports at prices stated to be as low as \$1.10 per bale of 140 pounds (T.C. Application 18096). The Class D rate in effect April 2nd, 1936, was \$1.37 to Groups D and H, \$1.30 to Groups E and F, and \$1.10 to Group J.

The carriers realize that the 65 cent rate at 30,000 pounds minimum producing \$195.00 per minimum car for haul from the Pacific Coast to Chicago was extremely low but agreed to these substantial reductions to enable the British Columbia shipper to meet this severe import competition.

The next important change was made effective December 24th, 1936, at which time the rates were increased 5 cents per cwt. under the Ex Parte 115 proceedings. The 5 cent increase under Ex Parte 115 was removed effective March 1st, 1937.

The rates were then increased 10% under Ex Parte 123 effective March 28th, 1938.

Plaintiffs' Exhibit No. 2—(Continued)
(Testimony of O. M. Anderson.)

The next important changes were made during 1940, under [115] which rates were established to Groups A, B, C, C-1, K, L, M and N on a graded basis with relation to the rates in effect to territory Group D and West. These rates were increased 6% under the Ex Parte 148 proceedings effective March 18th, 1942. The Ex Parte 148 increase was suspended May 15th, 1943, but was again restored effective July 1st, 1946.

The rates were then increased 20% under the Ex Parte 162 increase proceedings effective January 1st, 1947. The Ex Parte 162 increase was applied to the base rates not including the Ex Parte 148 increase.

Effective December 1st, 1947, the rates were reduced to the territory Group C-1 and West to the basis 6 cents over the rates in effect May 15th, 1943. The rates to Groups A, B and C territory were reduced to basis of 6 cents over the May 15th, 1943, rates effective February 1st, 1948, and similar adjustments made in the rates to the Southeast in Groups K, L, and M effective March 29th, 1948. The reduction in the rates to basis of 6 cents over the May 15th, 1943 rates was made because the rates upon peat from Wisconsin, Michigan and other Eastern states were increased a maximum of 6 cents per 100 pounds for the reason that in those territories peat was carried upon the fertilizer basis and automatically secured a 6 cent maximum increase under the increased tariff.

Plaintiffs' Exhibit No. 2—(Continued)

Testimony of O. M. Anderson.)

The Commission in their decision of December 5, 1946, in Ex Parte 162, authorized percentage increases with certain [116] maximums on particular commodities. In the case of fertilizers, NOS, covered by Group 640 of the Railway Accounting Officers Commodity Classification, they authorized an increase of 20 per cent with a maximum of 6 cents per 100 pounds of \$1.20 per net ton. Group 640 of the Railway Accounting Officers Association Commodity Classification of 1928 issued pursuant to the Order of Divisions 4 of November 22, 1927, in the matter of freight commodity statistics named various commodities under the heading of Fertilizers, NOS, including ground or unground peat.

The carriers published under authority of the Commission's decision in Docket X-162 their tariff of increased rates and charges No. X-162 Effective January 1, 1947, issued for account of various agents of the railroads, including L. E. Kipp, and bears his ICC No. A-3657. In Item 107 of that publication an increase of 20 per cent with a maximum of 6 cents per 100 pounds was published upon fertilizer and articles listed in tariffs making reference to this tariff as and when taking the fertilizer rates. Application was filed by shippers with the Ex Parte 162 Committee seeking interpretation that where specific rates were named on peat or peat moss they be given the same increase as on fertilizer. The Interpretation Committee considered the matter and ruled that where rates on peat or peat moss were

Plaintiffs' Exhibit No. 2—(Continued)

(Testimony of O. M. Anderson.)

published in fertilizer lists that the increase under Ex Parte 162 was 20 [117] per cent with a maximum of 6 cents per 100 pounds but that where rates were not so published they would be subject to the general increase of 20 per cent without maximum except that when moving on Class rates in official territory and between official territory and eastern Canada the increase would be 25 per cent and when moving in territorially the increase would be 22½ per cent (Interpretation No. 35, Letter No. 9 of February 28, 1947, by W. J. Kelly, Secretary, Interpretations Committee). The matter was later given further consideration on representation that rates from eastern Canada to points east of Mississippi River crossings moved on fertilizer rates and received a 6 cents maximum increase whereas rates to points west of Mississippi River crossings moved on peat commodity rates and took a 20 per cent increase, and carriers decided to provide a maximum increase of 6 cents irrespective of whether or not peat was carried in the fertilizer list.

The publication of a 6 cents maximum on peat is considered by the carriers to be their own voluntary act and was not required by the Commission's orders in Ex Parte 162.

I would like to make a further comment about the exhibits, and that is I did not attempt to increase any of these rates by Ex Parte 166 increases.

Exhibit 13 is a statement of rates on fertilizers from North Pacific Coast points to these same

Plaintiffs' Exhibit No. 2—(Continued)

(Testimony of O. M. Anderson.)

transcontinental lettered [118] group destinations. I might say that the rates were originally established with a view of providing a rate that would enable the Pacific Coast producers to meet the competition in the Western Trunkline and Eastern territory, with the producers of fertilizers like those located in the Middlewest and East.

Mr. Tolan: You are speaking of items listed on this Appendix, or of peat?

The Witness: I am speaking of Exhibit 13. There have been no changes in these rates other than the increases by the Ex Parte proceedings beginning with Ex Parte 123, and they are all explained on the exhibit, with the exception of the sulphate of ammonia rate, March 27th, 1948. That was a reduction that was made in order to assist the producer at Salem, Oregon, to ship and sell his product in Chicago and the Middlewest.

Q. Do you have any further comment on Exhibit 13? A. No.

Q. Will you explain what Exhibit 14 shows?

A. Exhibit 14 is a statement showing rates in effect on January 1, 1947, on peat and peas moss from New Westminster, British Columbia, to representative points in transcontinental lettered groups.

Exam. Hall: Well, now, that exhibit is self-explanatory unless there is something that you wish to point out.

The Witness: I wish to point out the range. The car mile earnings revenue will range from 10.68 per

Plaintiffs' Exhibit No. 2—(Continued)

(Testimony of O. M. Anderson.)

car mile to a high [119] of 21.05 per car mile, and is based upon a weight of 38,503 pounds per car, which rate, by the way, was secured by tabulating the weights that were submitted by the Complainant in the Appendix attached to the complaint. In other words, this is an average of all those shipments. Now, if we made the same calculations, using the tariff minimums, we would have a range of car mile revenue from 9.43 to 18.59 cents per car mile. I think the exhibit is self-explanatory.

Exam. Hall: Off the record.

(Discussion off the record.)

Q. (By Mr. Tjossem): Can you explain why you picked these destination points?

A. I examined the shipments shown on the Appendix, and I took them down, or broke them down into various transcontinental lettered groups and selected the principal points in the group to which shipments were actually made. For example, I took Syracuse, New York, because I didn't find any shipments to New York City, for example, but I found several to Syracuse.

Q. And you selected the destination points on the same analysis and basis?

A. That is correct.

Q. Have you any further comment on Exhibit 14?

A. No, except to say that the mileages are the shortest what I would term reasonable routes. I won't say that they are the very shortest routes, be-

Plaintiffs' Exhibit No. 2—(Continued)

(Testimony of O. M. Anderson.)

cause I didn't attempt to use seven [120] or eight railroads.

Exam. Hall: Are they tariff routes?

The Witness: Yes, they are tariff routes.

Q. (By Mr. Tjossem): Turn to Exhibit 15.

A. Exhibit 15 is a statement of rates on fertilizer, together with the revenue per car and per car mile, using a weight of 71,826 pounds, and also revenue per car and per car mile based on the tariff minimums. The weight of 71,826 pounds was secured from a study made by the lines serving Seattle, Tacoma and Portland. I don't recall whether it was a three-month period or longer.

Mr. Tjossem: I might just add, I will have a later witness who will show the breakdown for the 71,826 pounds.

Mr. Tolan: What figure is this?

Mr. Tjossem: Average loading of fertilizer, 71,826 pounds.

Exam. Hall: That exhibit is clear, and unless you want to point out some high spot on it,—

The Witness: The only thing I want to point out here is the revenue per car mile.

Exam. Hall: That is on the exhibit?

The Witness: Yes.

Exam. Hall: That is argument, and it can be argued in the brief.

The Witness: All right.

Mr. Tjossem: Turn to Exhibit 16, Mr. Anderson.

A. By the way, Exhibit 15 shows the results,

Plaintiffs' Exhibit No. 2—(Continued)

(Testimony of O. M. Anderson.)

using Seattle, [121] Washington as the point of origin.

Exhibit 16 is prepared in the same manner as Exhibit 15, except that we have used New Westminster, British Columbia as the point of origin. Now, rates do apply from New Westminster and from the Pacific Coast territory generally, and I showed this so that it could be matched with the earnings on peat moss from New Westminster, although I am not aware of any substantial movement from New Westminster. I think the exhibit otherwise is self explanatory.

Q. Do you have any further comment to add on that exhibit, Mr. Anderson? A. I think not.

Q. If you will recall Mr. Tolan's testimony, he read the items that were published, in which the carriers had construed and did construe to allow a 20% increase on the rates applying on peat when they published their change in the tariff pursuant to Ex Parte 162. Do you recall the item read by Mr. Tolan? I think Mr. Tolan made some comment. Would you say that that was an unusual method of publishing an item in the tariff? Was the language unusual or unique?

A. No. You will find that there were several items where maximum increases came into play. I refer to one in particular, the increase applying on grain and grain products and so-called articles taking those rates, as and when taking grain and

Plaintiffs' Exhibit No. 2—(Continued)

Testimony of O. M. Anderson.)

train products rates, and I could cite several others, if [122] you would like.

Q. And then it is your statement that it is not out of the way to publish the rates in the manner that that item was published? A. No.

Mr. Tjossem: You may cross examine.

Cross Examination

Q. (By Mr. Tolan: Is there any essential difference, Mr. Anderson, between my Exhibit No. 2 and your Exhibit No. 12?

A. Well, I don't think so, although I didn't examine the two very closely in comparison. I would say there is substantially no difference, except I think you showed the Ex Parte 166 increases in the last part of 1947; I did not do that.

Q. Do you think, Mr. Anderson, that it is right for the six cent maximum to be applicable to the Middlewest on December 1, 1947, and not to have it applicable to the Eastern receivers until February 1st?

Mr. Tjossem: I think that question is wholly argumentative. You can discuss that in the brief. I don't think counsel should argue it with the witness.

Exam. Hall: Well, he is a rate expert. I will get his opinion on it.

A. Well, the fact is, when you published the 78 cent rate on December 1 to the territory of Chicago and West, there also was submitted the same proposal to the Eastern and Southern [123] railroads,

Plaintiffs' Exhibit No. 2—(Continued)

(Testimony of O. M. Anderson.)

and they didn't see fit to join in the rates as of that date. The Eastern lines,—they concurred later, and their adjustment was published effective February 1st, and the Southern lines subsequently concurred and their adjustment was made effective March 29, 1948.

Exam. Hall: Then I take it that the transcontinental lines, the originating lines, did not control the adjustment, but that it was the destination lines?

The Witness: Well, they controlled the adjustment up to Chicago, but not East of Chicago, nor to the southwest.

Exam. Hall: Were these published as one-factor rates and not combination?

The Witness: No, sir.

Exam. Hall: It comes to this, then, that they did control the publication of that rate?

The Witness: They controlled it to their territory.

Exam. Hall: So far as you are concerned, it was a one-factor rate, and the shipper could not find anything but the rate from the origin to the Eastern destination; would it be correct?

The Witness: Yes.

Exam. Hall: I take it that your admission or statement is that, so far as you are concerned as an originating line, you would have been willing to publish the rate?

Plaintiffs' Exhibit No. 2—(Continued)

(Testimony of O. M. Anderson.)

The Witness: As of that date, December 1st, 1947. [124]

Exam. Hall: But there was a difference of opinion, and the Eastern lines would not go along with that?

The Witness: I might put it this way, that they considered it at their meetings, and they just took a certain length of time to get around to it.

Exam. Hall: I understand it. There must be a difference of opinion on the Eastern lines; otherwise, the whole group of carriers would have got together and published what they thought was the proper rate under the order?

The Witness: This was not published as a result of any idea that we were required to publish it under the order.

Exam. Hall: I am not saying that, but I am trying to get the procedure in publishing the rate from a transcontinental origin to a destination East of Chicago.

The Witness: Well, the procedure is this: When the transcontinental lines consider any proposition, they determine it upon a certain set of rates, not only Chicago and West, but into the East and Southeast, and they submit the proposal to those jurisdictions for their concurrence, and they allow a certain period for those lines to act; and if they don't act within a certain time we usually proceed with the rate in the territory of Chicago and West, irrespective of what they do East of Chicago.

Plaintiffs' Exhibit No. 2—(Continued)
(Testimony of O. M. Anderson.)

Exam. Hall: Let me ask you this, and if you think it is not fair, you do not need to answer. If you had full control [125] over the publication of the rates from the transcontinental origins to the destinations East of Chicago on January 1, 1947, what increases would you have applied on peat moss?

Mr. Tjossem: That should be December 1, 1947.

Exam. Hall: I accept the correction, counsel. On December 1, 1947?

The Witness: We would have published the rates that were subsequently established, because our group approved those rates, and the only reason they were not published on those dates was because of the lack of concurrence on the part of the Eastern or Southern lines.

Exam. Hall: That is, on the lines West of Chicago where you had complete jurisdiction, you published the six cent increase?

The Witness: On December 1, 1947.

Mr. Tolan: I thank the witness for a very frank answer to that question.

Q. (By Mr. Tolan): Turning to your Exhibit 13, do you know of a dried blood movement eastbound from Seattle to transcontinental destinations? A. No, I do not.

Q. Do you know of any sulphate of ammonia eastbound to transcontinental destinations?

A. Well, I just don't know; I have not made an investigation.

Plaintiffs' Exhibit No. 2—(Continued)

(Testimony of O. M. Anderson.)

Q. Do you know of any eastbound movement of manure from Seattle [126] to eastbound destinations?

A. Probably not.

Q. Isn't it true that manure is not moving eastbound, and that there is an application before the carriers to provide a lower rate on manure from the Montana area to the Coast?

A. I know we have had request to reduce the rates, yes.

Q. Isn't the Lilly Company moving a substantial quantity of manure westbound, and not eastbound?

A. Well, I will say this; they are not moving any via the Great Northern, that I know of, at least.

Exam. Hall: Mr. Anderson, in connection with your Exhibit 13, did you make some correction on that? My copy says the North Pacific Coast origin.

The Witness: That is correct.

Q. (By Mr. Tolan): I believe you said that this was from Seattle. Do you know?

A. No. I said that the average load that we used on Exhibit 15 was based on the tonnages of fertilizer from Seattle, Portland and Tacoma.

Q. Just to clarify the record, even though you used the word, "Seattle," wouldn't that cover any place West of the Cascade Mountains? Do you know of any movement of this type to eastbound destinations?

A. There are other commodities named.

Plaintiffs' Exhibit No. 2—(Continued)

(Testimony of O. M. Anderson.)

Exam. Hall: What are you referring to? [127]

Mr. Tolan: I am referring to the exhibit.

Q. (By Mr. Tolan): You have listed only dried blood, sulphate of ammonia and manure.

A. Well, the heading of the exhibit says that there are certain commodities described in a certain item of L. E. Kipp's Tariff 1527.

Exam. Hall: Let us not take time for that. If the exhibit is misleading,——

The Witness: I don't think it is misleading; I don't think it needs any correction.

Exam. Hall: Well, it is to me. If you are going to refer to a tariff item and put in a lot of other commodities, I say to that extent the exhibit is not complete. You have dried blood, sulphate of ammonia and manure.

The Witness: Well, those are the principal items named. I will say that there may have been movements from some North Coast points; I am not aware of that, because I don't know.

Q. (By Mr. Tolan): You will say there is not any movement? A. No, I do not know.

Q. You are familiar with the volume of movement given in my Exhibit No. 1, 1268 cars?

A. Yes.

Q. None of these would approximate that movement, from your knowledge?

A. No, I don't imagine they would. [128]

Q. Do you have any idea of the value of 100

Plaintiffs' Exhibit No. 2—(Continued)

(Testimony of O. M. Anderson.)

pounds of dried blood as compared with 100 pounds of peat moss? A. No, I don't.

Q. Or of sulphate of ammonia? A. No, sir.

Q. Or of manure? A. No, sir.

Q. Now, in working out your Exhibit 14, Mr. Anderson, I note, for example, you have testified to the 09.43 car mile earnings into New Orleans. Have you any idea how many cars moved into New Orleans?

A. No, but I can tell you there were 19 carloads that went from points in Louisiana; some of those, no doubt, from New Orleans.

Q. How many cars went into Iowa?

A. There were 96 cars into Iowa.

Q. How many cars into Kansas?

Exam. Hall: Let us not get into all the details of the specific car movements. I will ask you this question: So far as you know, were there movements to every point shown on the exhibit?

The Witness: Definitely. These points were selected from the Complainants' Exhibit; there were movements to or from every point, and, in some cases, a number of cars.

Q. (By Mr. Tolan): Would you refer to Exhibit 15. The same [129] objections which I brought out to Exhibit 13, lack of knowledge of movements on Eastbound traffic, and no knowledge as to the value, would be equally applicable as to Exhibit 15; is that correct? A. That's right.

Q. You know of no movement of any of the spe-

Plaintiffs' Exhibit No. 2—(Continued)
(Testimony of O. M. Anderson.)

cific items on Exhibit 15, eastbound?

A. Well, I know of none; but I am not saying there are none.

Exam. Hall: If there isn't any movement, why would they go to the expense of publishing the rate?

Mr. Tjossem: He did not say there was no movement; he said he did not know of them.

The Witness: Well, there may have been in the past.

Exam. Hall: If there are not any moving today, and apparently you don't know, the carriers should get rid of the tariff items.

The Witness: I daresay, if you wanted to ship manure from Montana to some points in the East, you probably would use this rate; or from any of these points here named.

Q. (By Mr. Tolan): The movement, however, is not a matter of your knowledge?

The Witness: As a maximum, I doubt if there is any rate on manure from Montana to points East of Chicago, in Tariff 1514.

Q. (By Mr. Tolan): You mean that the manure, if there is any movement, would probably move from Montana and not from British [130] Columbia?

A. Well, there might be a movement from Utah under these rates.

Q. Do you contend the basic rates on peat moss are unreasonably low?

A. I say they are low. Any rate that runs a car

Plaintiffs' Exhibit No. 2—(Continued)

Testimony of O. M. Anderson.)

mile revenue as shown on these exhibits would be a low rate.

Q. Has this matter been up for a year and a half?
A. What do you mean?

Q. Well, I will put it this way. Since this matter has been up for a year and a half, have the carriers made any effort to raise the rate?

A. Other than the general increase?

Q. Other than the basic rates themselves?

A. Don't forget that we made the rates to try to help the shippers sell their products in the East. We know that the rates are low, and they run a low revenue per car.

Q. Did they develop the business that you hoped they would?

A. They certainly developed a lot of business.

Q. Are you familiar with the rates from Eastern Canada and Maine to the points I listed on Exhibit , into Midwestern points and points West of Chicago?

Exam. Hall: I don't think he needs to answer that. He didn't testify on rates in Eastern Canada.

Mr. Tjossem: Improper cross examination.

Q. (By Mr. Tolan): You stated for the record that the secretary [131] of the Interpretations Committee ruled that peat moss was not subject to a six cent maximum?

A. Mr. Kelly did not rule, but the Interpretations Committee did rule.

Q. Did he rescind that action later?

Plaintiffs' Exhibit No. 2—(Continued)
(Testimony of O. M. Anderson.)

A. No, sir.

Exam. Hall: You are excused.

(Witness excused.)

Mr. Tjossem: I would like to offer Exhibits 12 to 16, inclusive.

Exam. Hall: Exhibits 12 to 16, inclusive, will be received in evidence.

(Defendants' Exhibits 12 to 16, inclusive,
Witness Anderson, received in evidence.)

Mr. Burkett: I will call Mr. Zika.

FRANK J. ZIKA

was sworn and testified as follows:

Mr. Burkett: I have some exhibits here which Mr. Zika is going to discuss, some six or seven of them, and I think it would be well to identify them now.

Exam. Hall: They will be identified. How many do you have?

Mr. Burkett: I think I have seven.

Exam. Hall: The first one will be 17, and the others will be numbered in order.

(Defendants' Exhibits 17 to 23, inclusive,
Witness Zika, [132] marked for identification.)

Direct Examination

Q. (By Mr. Burkett): Will you state your address?

A. 65 Market Street, San Francisco, California.

Q. I forgot to ask your name?

Plaintiffs' Exhibit No. 2—(Continued)

(Testimony of Frank J. Zika.)

A. Frank J. Zika.

Q. By whom are you employed, and what position do you hold?

A. I'm employed by the Southern Pacific in the capacity of Commerce Agent, on the staff of the Freight Manager, in charge of rates and divisions.

Mr. Tolan: We will accept the qualifications of the witness and avoid going through that, to conserve time.

Q. (By Mr. Burkett): In whose behalf do you appear as a witness?

A. I am appearing on behalf of the Southern Pacific and on behalf of the California, Arizona and Nevada Lines, Defendants.

Q. Are you familiar with the issues involved in this proceeding so far as they involve those carriers?

A. I am.

Q. Have you prepared a series of exhibits for introduction in evidence in this proceeding?

A. I have.

Q. They have already been marked for identification, and will you please refer to the first of these exhibits, which has been marked by the Reporter as Exhibit 17, bearing the designation "Statement showing chronological history of changes in [133] basic joint rates on peat, carloads, from New Westminster, B.C., as representative of British Columbia origins, to representative destinations in California."

A. Exhibit No. 17 shows changes in rates from

Plaintiffs' Exhibit No. 2—(Continued)

(Testimony of Frank J. Zika.)

date of March 6, 1937, when through joint carload rates on peat were first published from New Westminster, B. C., to California destinations. It shows to what destinations rates were first established and the additional destinations subsequently added.

The rates on Column 2 of 80 cents to San Francisco Bay district and 100 cents to Southern California were established effective March 6, 1937, to meet cost of handling by steamer and rail to points in interior of California. Subsequent study developed that very little of the peat was moving from Canada because of import competition through direct sailings from Germany and Sweden to the Pacific Coast. Customs figures for San Francisco show importation of European peat of 4455 net tons in 1936, 4633 net tons in 1937, and 3279 net tons for the first eight months of 1938. From Germany rate was \$7.80 per 1000 kilos (2205 pounds) equivalent to 35.38 cents per 100 pounds. Handling charge was 40 cents per net ton and state toll 15 cents per net ton, making 38.13 cents per 100 pounds on docks at San Francisco. From Sweden rate was \$9.00 per 1000 kilos, equivalent to 40.81 cents per 100 pounds, which plus handling and toll charges made total 43.56 cents per [134] 100 pounds on dock at San Francisco.

California distributors not having foreign accounts were extremely anxious to secure outlet for Canadian peat and were considering movement by rail to Seattle, Washington, for 15 cents per 100

Plaintiffs' Exhibit No. 2—(Continued)

(Testimony of Frank J. Zika.)

pounds, then by steamer to San Francisco at rate of 34 cents or total of 49 cents. All-rail combination over Seattle was 15 cents plus a non-intermediate rate of 43 cents from Seattle to San Francisco, a total of 58 cents. The 43-cent rate was published on a 9-cent arbitrary over the water rate, that being the minimum spread the rail lines were permitted under Fourth Section relief granted in Pacific Coast Fourth Section Applications, 165 ICC 373, decided July 10, 1930.

It was the rail lines' judgment that through rates were equivalent to rail Fourth Section rate combination from British Columbia to San Francisco were necessary to meet the foreign and coastwise competition and rates of 58 cents to central California with related rate of 73 cents to Los Angeles were established, effective June 30, 1939, as shown in Column 4 of the exhibit. Subsequently related rates were established to other destinations located north and south of the San Francisco area.

The next major change is that shown in Column 7 as becoming effective August 6, 1940, involving a rate to Southern California of 72 cents. This change was necessitated by reduction [135] in rate from British Columbia, Washington and Oregon to the Middlewest to meet foreign competition in that territory, as already explained by a previous witness, and such depressed transcontinental rate was held as a maximum in Southern California.

In Columns 14 and 15, I have shown the rates

Plaintiffs' Exhibit No. 2—(Continued)

(Testimony of Frank J. Zika.)

which became effective January 1, 1948. Shortly before that date the rail lines because of the Commission's decision in ICC Docket 29721—All-Rail Commodity Rates between California, Oregon and Washington, 268 ICC 515, and related cases, had been giving consideration to increasing various Pacific coastwise rail rates, including the peat rates from British Columbia.

A proposal was placed on the public docket to increase the peat rates to the full 25% increase sought in Ex Parte No. 162 proceeding instead of the 20% granted. It developed, however, that this could not be done to Southern California because such rate could not exceed the transcontinental rate which had been reduced to a gross rate of 78 cents for reasons already explained by a previous witness. Increasing the San Francisco base rate of 58 cents a full 25% would have made that gross rate 73 cents. Because this would have resulted in a spread of only 5 cents under the Southern California rate, it was decided to do no more than publish as a gross rate to the San Francisco area the base rate of 58 cents increased 20%, or 70 cents. [136]

The Report in ICC Docket 29721 gives a comprehensive history of the Pacific Coastwise rail rate structure, so I will not burden this record with its details. It is necessary to explain, however, that the Commission in that proceeding permitted the rail carriers to increase a specified list of commodities approximately 4.2% over rates resulting from Ex

Plaintiffs' Exhibit No. 2—(Continued)

(Testimony of Frank J. Zika.)

Parte No. 162 increase. In permitting this increase the Commission stated that rail carriers could propose similar increases in their other coastwise class and commodity rates. The proposal to further increase peat rates was a result of that suggestion.

In report on ICC Docket 29721 the Interstate Commerce Commission also ordered cancellation of the previous existing fourth section relief in all-rail rates between Pacific Coast ports. This had the effect of cancelling the non-intermediate water competitive rate on peat from Seattle to San Francisco that had served as basis for the competitive rate established from British Columbia to California.

Exhibit 18 was prepared to show the assailed and sought gross rates compared with constructive gross rates. The constructive basis is what the rate level originally established March 7, 1937, would have been on January 1, 1947, if there had been no intervening rate reductions due to competitive conditions.

The January 1, 1947, rates in Column 14 include the applicable [137] Ex Parte No. 162 increase of 20% while those in Column 15 are on basis of including the 6 cent maximum increase sought by Complainants. For example, the San Francisco rate on Line 1 shows the assailed gross rate to be 70 cents while Complainants seek a gross rate of 64 cents. The constructive basis would have provided a gross rate of 106 cents with the applicable Ex Parte No. 162 increase and 94 cents with the sought

Plaintiffs' Exhibit No. 2—(Continued)

(Testimony of Frank J. Zika.)

Ex Parte No. 162 increase. In either case the constructive rates are substantially higher than the assailed basis.

Exhibit No. 19 shows briefly the changes in the rail rates from Seattle, Washington to San Francisco and Los Angeles, California, and the coastwise water rates from Seattle to San Francisco and Los Angeles Harbor from the date of June 29, 1939, when such rates were used as basis for reducing joint rate from British Columbia to California destinations. It will be noted in Columns 6 and 7 that by December 31, 1946, the San Francisco base rates had been increased 12 cents and the Los Angeles base rates 16 cents, the rail rates at all times having preserved the 9 cent arbitrary required in the Fourth Section authority. In the same period the joint base rate from British Columbia origins to California destinations, although originally based on the Seattle to California water competitive factors had not been increased.

In Column 8 the exhibit shows that effective September 15, [138] 1947, as result of the proceeding cited, the water competitive non-intermediate rail rates were cancelled because the Interstate Commerce Commission vacated and set aside the Fourth Section relief.

Exhibit No. 20 was prepared to supplement my earlier testimony with respect to basis for reducing the through joint rates from British Columbia origins to San Francisco, effective June 30, 1939.

Plaintiffs' Exhibit No. 2—(Continued)

(Testimony of Frank J. Zika.)

This exhibit shows in Column 3 the rate factors when the reduction was made. The rates on Lines 2 and 5 are the non-intermediate rates on peat permitted under the Fourth Section relief authorized in Pacific Coast Fourth Section Applications, 165 UCC 373, decided July 10, 1930, based on 9 cents over the coastwise steamer rates to San Francisco and Los Angeles Harbor. In Column 4 I show what the same combination would have been on December 31, 1946. By that time the water rates had increased 12 cents to San Francisco and 16 cents to Los Angeles Harbor, with same increase having been made in the rail non-intermediate rates.

If instead of reducing the through rates on June 30, 1939, the rail lines had continued to permit combination rates to apply based on the depressed port-to-port non-intermediate rates the combination to San Francisco on December 31, 1946, would have been a base rate of 70 cents instead of 58 cents, and to Los Angeles a base rate of 90 cents instead of 72 cents.

Column 5 shows that the sought increase of 6 cents added to [139] such combination rates would have produced gross rates of 76 cents and 96 cents, respectively, to San Francisco and Los Angeles. These figures can be compared with the assailed rates shown in Columns 6 and 7 and the sought rates shown in Columns 8 and 9.

Exhibit No. 21 shows number of shipments from the various British Columbia origins to destinations

Plaintiffs' Exhibit No. 2—(Continued)

(Testimony of Frank J. Zika.)

in California, Arizona and on Southern Pacific Company in Oregon to which shipments moved in the year 1947. Except for the 88 cars destined Los Angeles, this showing indicates that movement is sporadic and traffic could generally be expected to move on a maximum reasonable basis of class rates.

Exhibit 22 is intended to show how the assailed gross rate, that is, the base rate plus applicable Ex Parte 162 increase of 20%, compares with Class D and E rates for short line distance based on ICC Docket 14999 scale. Class D was the applicable Western Classification rating in Agent R. C. Fyfe's ICC No. 26 and subsequent issues. Class E rating was applicable under exception published in Agent W. J. Bohon's ICC No. 677 and Southern Pacific's ICC No. 4563 to destinations in Oregon and Washington. The Class D and E scale rates are also shown as gross rates but are on a basis of including the sought Ex Parte No. 162 increase of 6 cents maximum instead of the applicable 20% increase.

It will be noted that such constructive Class D rates in [140] Column 4 are in all but one instance less than the assailed gross rate and that all but four are even less than the constructive Class E basis.

Columns 6 to 9 make a similar showing as to rates from International Boundary, Washington, located north of Blaine, Washington, on the United States-Canadian Border. This is intended to show that reasonable rates were in effect from the inter-

Plaintiffs' Exhibit No. 2—(Continued)

(Testimony of Frank J. Zika.)

national border for use in making combination rates with local Canadian factor if no joint international rates were in effect. Local rate from New Westminster, B. C., to International Boundary, Washington, was and is 9 cents, per Great Northern Railway GFO 771-G, C.T.C. No. 2349.

Columns 10 to 13, inclusive, show a similar comparison involving rates from Redmond, Washington, a producing point on the Northern Pacific Railway near the Canadian Border. This shows that assailed rates from British Columbia origins compare favorably with rates maintained from a United States origin to same destination in California. Traffic from Redmond, Washington, would move over same rails as traffic from British Columbia origins, except for a short distance of 7 miles from Redmond to Woodinville, Washington. In making this comparison with class rates I should like to call attention to the fact that in C. H. Lilly v. Great Northern Railway, et al., 253 ICC 417, the Commission found that Class E rates applied to carload shipments of fertilizer between certain [141] points in Mountain-Pacific territory were not unreasonable. However, in this case we are dealing with a commodity which is not a fertilizer.

Exhibit No. 23 is a statement showing various assailed rates applied on carload shipments of peat from British Columbia origins to destinations on Southern Pacific Company in Oregon and California, the rates sought by Complainants to same

Plaintiffs' Exhibit No. 2—(Continued)

(Testimony of Frank J. Zika.)

destinations, and comparisons made of such rates with rates sought to be applied on shipments to destinations in Washington, Idaho and Utah.

For example, on Line 5, it is shown that Complainants consider charges under a rate of 86 cents unreasonable for a distance of 1417 miles from New Westminster, B. C., to Los Angeles, California, and they seek rate of 78 cents for that movement.

On Lines 7 to 11 in Column 7 it is shown that for much shorter hauls ranging from 650 miles to 1078 miles Complainants indicate their satisfaction with application of a rate of 78 cents.

Q. (By Mr. Burkett): Does that conclude your testimony, Mr. Zika? A. Yes.

Mr. Burkett: I offer Exhibits 17 to 23, inclusive, in evidence.

Exam. Hall: Exhibits 17 to 23, inclusive, will be received. [142]

(Defendants' Exhibits 17 to 23, inclusive, Witness Zika, received in evidence.)

Mr. Burkett: You may inquire.

Cross Examination

Q. (By Mr. Tolan): Would you refer to your Exhibit 17, please. You pointed out that the rates presently established as shown on that exhibit were based to meet foreign competition? A. Yes.

Q. Then, why did you state that the rates were put in to meet foreign competition, and then in the

Plaintiffs' Exhibit No. 2—(Continued)

(Testimony of Frank J. Zika.)

later exhibits compare the port-to-port rates which were not involved?

A. The Canadian lines and the Canadian shippers were prepared to make use of the port-to-port rates to reach California to meet the foreign competition.

Q. But the foreign competition was the situation which you were meeting in California when the rates were established?

A. It was a combination of both. We knew the Canadian shippers were preparing to come into California, and in order to help them meet the foreign competition we made the reduction.

Q. Is there any reason why the same situation that you described with regard to foreign competition could not come back?

A. That would be putting me in the role of a forecaster; I am afraid I cannot tell you.

Q. Do you know of any peat moss that has moved since 1940 on port-to-port rates? [143]

A. No, sir, I do not, because I believe the low rates gave the Canadian shippers an opportunity to move the commodity by rail and it was unnecessary to move on port-to-port rates.

Q. Were there any through water routes from New Westminster, British Columbia or Vancouver, to the California ports?

A. Yes, there were water routes.

Q. Through one-factor rates?

A. I don't know whether they were one-factor

Plaintiffs' Exhibit No. 2—(Continued)
(Testimony of Frank J. Zika.)

rates; I know there were water routes operating.

Q. You stated that you could not apply the full 20% increase into Southern California because of the transcontinental ceilings? A. That's right.

Q. How did you arrive at that?

A. Obviously, with a 78-cent rate in effect from the North Coast, from Washington, British Columbia, to the Middle Northwest, we felt that we could not charge a greater rate than that to Los Angeles.

Q. It was based on Fourth Section departure?

A. No, sir. I might qualify that. The Fourth Section was involved in that shipment may have moved from Washington to Los Angeles.

Q. We are talking about British Columbia.

A. But the same rate applied from Washington, and to the same extent that a shipment could be shipped that way,—

Q. From British Columbia, there was not a Fourth Section departure, [144] but it was merely a matter of policy that established the maximum?

A. Yes.

Q. Well, would you say that it is a sound policy to charge a 6 cent maximum into Southern California?

A. That has nothing to do with the maximum; this had to do with the gross rate to Los Angeles versus a gross rate into the Middlewest and Southwest.

Q. You feel that the gross rate to Southern California is sound policy, but you didn't feel on De-

Plaintiffs' Exhibit No. 2—(Continued)

(Testimony of Frank J. Zika.)

December 1, that the 6 cent maximum was a sound policy into Northern California?

A. I don't quite understand you.

Q. You stated that you considered the 6 cent maximum a sound policy into Southern California. I asked you if you considered the full 20% increase in Northern California,—

A. We considered a 25%.

Exam. Hall: Off the record.

(Discussion off the record.)

Q. (By Mr. Tolan): Do you know of any water movement from the Pacific Northwest into California during the time of water competition?

A. No, sir.

Q. Do you know of any shipment of peat by water from Washington production points into California during the period of water competitive rates? [145]

A. I know of no actual movement, Mr. Tolan.

Exam. Hall: That would indicate that your rates were successful in taking it away from the water lines?

The Witness: I would not say there was a movement or not; I don't know of it.

Q. (By Mr. Tolan): Turning your attention now to Exhibit 18. Will you describe what "constructive" means?

A. It means, being a theoretical rate, going back to the original rates which were established for the movement, and then bringing it up to date, and

Plaintiffs' Exhibit No. 2—(Continued)

(Testimony of Frank J. Zika.)

showing what they would be if they had not been reduced to meet competition.

Q. Have you made any comparable adjustments in other rates such as you have of these peat rates?

A. What is the question?

Q. From New Westminster to California points you have taken a constructive basis and carried it through to conclusion without any intervening changes. Now, have you made changes and adjustments on other traffic moving from New Westminster and the Vancouver area into California during this period of time?

A. Changes have been made in various effective increases over the 20% which was granted by the Commission.

Q. Would you say there was nothing unique about the treatment which was given the peat rate as compared with the average commodity? [146]

A. I don't think I understand you.

Q. Is there anything exceptional about the treatment of peat as compared with other commodities?

A. Yes, we held to an increase of 20% to San Francisco, where as other rates were increased to 25%.

Q. It was a voluntary act?

A. Yes, it was a voluntary act as a result of the Commission's request that we consider other coast-wise rates.

Q. Has the Southern Pacific maintained any policy regarding the commodity rates differential

Plaintiffs' Exhibit No. 2—(Continued)

(Testimony of Frank J. Zika.)

between San Francisco Bay area and the Los Angeles area?

A. Not the Southern Pacific line. The California carriers have a policy on that.

Q. What is that policy?

A. I cannot say whether they have determined the differential should be 15 cents or 20 cents, but there is a formula for adjusting the spread between Los Angeles and San Francisco.

Q. Do you know of any case where the rates have been established on a spread as small as that established on peat moss, Northern California versus Southern California, in other rates where the spread is less than that provided at the present time?

Mr. Tjossem: You mean in terms of percentages or in terms of cents?

Mr. Tolan: Let me rephrase it. [147]

The Witness: I would have to make a tariff study.

Q. (By Mr. Tolan): You don't know at the present time whether there is any rate with as small a spread?

A. I don't know whether that is the only one, or whether there are others that have a less spread; that would be a matter of tariff study.

Q. Great emphasis has been placed by you in the Fourth Section applications in relation to competing rates—were there many other commodities moving under maximum rates that were not substan-

Plaintiffs' Exhibit No. 2—(Continued)

(Testimony of Frank J. Zika.)

tially adjusted when the port-to-port rates were considered?

Mr. Tjossem: You mean maximum reasonable rates?

Q. (By Mr. Tolan): Maximum rates published in Section 4 of Tariff 1S?

A. Rates intermediate in application?

Q. Yes.

A. There were many of the rates that were adjusted as a result of the Commission's recommendation in Docket 29721.

Q. Were there any rates that were not raised by the cancellation of the Fourth Section relief?

A. That is something I could not say offhand.

Q. Are you familiar with the glassware rates?

A. No, sir.

Q. You said that,— in your Exhibit 21 you said that that indicates the movement to points other than Los Angeles is [148] sporadic. Why did you come to that conclusion?

A. It is a logical conclusion, when you see only two cars moving to one destination, from various origins.

Q. You base your statement on the fact that 88 cars moved into Los Angeles? A. That's right.

Q. Did you consider that many of the towns having quite a population border very close to Los Angeles? And that much of this peat moss may have gone to those places?

A. That's possible.

Plaintiffs' Exhibit No. 2—(Continued)

(Testimony of Frank J. Zika.)

Q. You show 455 cars in one year into the State of California. Was that a sporadic movement? Would you say that is a sporadic movement?

A. Scattered as it was over the State, I would say so, yes.

Q. In your Exhibit 22, you put in rates there from Redmond, Washington. Do you know of any actual movements from Redmond, Washington?

A. Not at the present time, no; in the course of my experience with the rates on the North Coast, there were shipments made from Redmond.

Q. In the past? A. In the past.

Q. In regard to your Exhibit 22, you made a statement wherein you compared the peat moss commodity rates with the class rates; is that correct [149]

A. Yes. Not actual class rates; those are not actual class rates.

Q. Constructive class rates?

A. That is right.

Q. You stated in Exhibit 22, that the C. H. Lilly Company case, Lilly versus the Great Northern, 253 ICC 417, held that Class E rates applied to carload shipments of fertilizer between certain points in Mountain Pacific territory were not unreasonable. Did you mean all points, or some points?

A. Yes.

Q. Then they definitely made a decision otherwise on some points?

A. The Commission made the general observa-

Plaintiffs' Exhibit No. 2—(Continued)

(Testimony of Frank J. Zika.)

tion that fertilizer moving under Class E rates in inter-mountain territory was not unreasonable. I understand they made no finding of unreasonableness in that decision.

Q. You made another statement with regard to Exhibit 22. "However, in this case we are dealing with a commodity that is not fertilizer." That is a matter of your opinion, is it not?

A. Well, it is a matter of my personal knowledge when I bought peat moss in California.

Q. (By Exam. Hall): It is still a matter of opinion? A. I presume you would call it that.

Q. (By Mr. Tolan): In regard to Exhibit 23, you testified that the Complainants are satisfied with the rates into Oregon; is [150] that correct?

A. No; my statement in connection with Exhibit 23 was based on the complaint wherein you indicated the rate you would be satisfied with into Idaho, Eastern Washington and Utah; so I compared the rates that you felt were reasonable into that territory with rates that you assail in California.

Q. You assumed that because we did not complain of them, we were satisfied?

A. That was my conclusion.

Mr. Tolan: That's all.

Exam. Hall: You are excused.

(Witness excused.)

Mr. Tjossem: I will call Mr. Henderson.

Plaintiffs' Exhibit No. 2—(Continued)

H. R. HENDERSON

was sworn and testified as follows:

Direct Examination

Q. (By Mr. Tjossem): Will you state your name, please? A. H. R. Henderson.

Q. What is your occupation, and by whom are you employed?

A. Assistant General Freight Agent, Northern Pacific Railway, Seattle, Washington.

Q. Are you familiar with the complaint in this proceeding? A. Yes.

Mr. Tolan: We admit the qualifications.

Q. (By Mr. Tjossem): Have you prepared any exhibits in connection [151] with this proceeding?

A. I have.

Q. Have you also prepared a statement in connection with the first exhibit? A. Yes, I have.

Mr. Tjossem: Perhaps we had better have those identified first.

(Defendants' Exhibits 24 to 28, inclusive, Witness Henderson, were marked for identification.)

Q. (By Mr. Tjossem): Will you proceed with your statement, please, Mr. Henderson?

A. All rates mentioned will be stated in cents per hundred pounds.

Prior to January 13, 1930, the rates applying on peat from British Columbia origins to points in Oregon, north and east of Portland, Oregon, Wash-

Plaintiffs' Exhibit No. 2—(Continued)

(Testimony of H. R. Henderson.)

ington and Northern Idaho were the Class D rates, carrying a minimum of 36,000 lbs.; the Class D rate, for example, from New Westminster to Seattle and Tacoma being 17 cents and to Portland being 33 cents.

As evidenced by a letter from Western Peat Company, Ltd. under date of October 2, 1929 addressed to the Northern Pacific Railway Company, which letter is a part of Exhibit 29, application was made by the Canadian producers of this product in the fall of 1929 to reduce the rate and minimum weight [152] applicable to carload shipments. As a result of this application a rate was published effective January 13, 1930, of 20 cents applying from New Westminster to Seattle with a minimum of 25,000 pounds; reducing the revenue on the basis of minimum carloadings in the amount of \$11.20 per car.

Following this, continuous applications were made by consignees of this product in the State of Washington and by the producers of this product in Canada to lower the rates and to lower the minimums.

The constant demand for these reductions resulted in the following changes: On June 30, 1930, a 14 cent rate was published from New Westminster to Seattle and Tacoma with a minimum of 40,000 pounds. At the same time the Portland rate was reduced to 26 cents, minimum 40,000 pounds.

Effective December 6, 1930, the minimum of

Plaintiffs' Exhibit No. 2—(Continued)

(Testimony of H. R. Henderson.)

40,000 pounds on 14 cent rate to Seattle and Tacoma and on the 26 cent rate applying to Portland was reduced to 36,000 pounds.

The continued efforts of Canadian producers and the consignees in Washington to reduce the rates and minimums applying on these shipments lead to a further reduction in rates effective August 6, 1931, at which time the rate from New Westminster to Seattle and Tacoma was reduced to 17 cents with a minimum of 24,000 pounds; and a rate was published to Portland of 33 cents, minimum 24,000 pounds.

On June 20, 1932, rates were published to Portland as [153] follows: 31 cents, minimum 24,000 pounds; 24 cents, minimum 40,000 pounds.

With the publication on January 10, 1935 of the 14 cent rate applying from New Westminster to Seattle and Tacoma with minimum of 30,000 pounds, the minimum carload revenues on this commodity had been reduced to \$42.00 per car as compared to \$61.20 per car, revenue return under the rates in effect prior to January 13, 1930, or a difference of \$19.20 per car.

Effective the same date, a 24 cent rate was published to Portland, minimum 30,000 pounds. The same comparison will show that the carload revenues had been reduced from \$180.80 to \$144, or a reduction on revenue of \$36.80 per car.

The rates previously mentioned which were effective on March 23, 1937, to Seattle and Tacoma, and

Plaintiffs' Exhibit No. 2—(Continued)

(Testimony of H. R. Henderson.)

the rates which were effective January 10, 1935 to Portland, remained unchanged except for the ex parte increases permitted by the Interstate Commerce Commission.

It might be pointed out that effective January 8, 1941, the origin points of Fraser Street and Pitt Meadows, B. C. were placed on the same basis as New Westminster on shipments moving to Seattle-Tacoma, Washington and Portland, Oregon.

(Defendants' Exhibit No. 29, Witness Henderson, marked for identification.)

Q. (By Mr. Tjossem): What is Exhibit No. 24?

A. That is a historical statement showing car-load commodity [154] rates and minimum weights on peat since first established January 13, 1930, to and including March 28, 1948, from New Westminster, British Columbia, and related origins, to Portland, Oregon, Tacoma and Seattle, Washington.

Q. Why did you pick out Seattle, Tacoma and Portland?

A. Because there are no through published class rates from New Westminster to most of the points to which shipments move, and these rates to Seattle, Portland and Tacoma are used to make rates beyond. The same is true, that is, used in combination to make rates to points beyond Portland.

Q. This shows the date the rate was made effective, and the minimum pounds per car in each instance?

A. That is right. It shows that the rails were

Plaintiffs' Exhibit No. 2—(Continued)

(Testimony of H. R. Henderson.)

trying to help the industry get established in shipping to this territory in competition with European peat.

Q. Have you anything further to say on Exhibit 24? A. No.

Q. What is Exhibit 25?

A. Exhibit 25 is a statement showing the number of cars, total weights, and average weights on shipments of peat from New Westminster, Pitt Meadows and South Fraser Street, British Columbia, to destinations in Idaho, Montana, Oregon, and Washington, to which there was a movement as shown in Complainants' Appendix 1.

Q. What is Exhibit 26? [155]

A. Exhibit 26 is a statement showing the movement of fertilizer during the months of February and March, 1947, from Tacoma and Seattle and North Portland, Oregon, to destinations in Oregon, Washington and Idaho via the Great Northern Railway, Northern Pacific Railway and Union Pacific Railroad. Stating the number of cars, total weights, and the average weight per car.

Q. You have there a figure showing the average weight per car of fertilizer was 71,826 pounds?

A. Yes.

Q. That is the figure used by Mr. Anderson in his exhibit?

A. That is right, in a previous exhibit.

Q. Turn to Exhibit No. 27. Can you tell us what that is?

Plaintiffs' Exhibit No. 2—(Continued)
(Testimony of H. R. Henderson.)

A. Exhibit 27 is a statement showing the rates, in cents per 100 pounds, on which there was a movement, from New Westminster, British Columbia to destinations in Idaho, Montana, Oregon and Washington, as shown in Complainants' Appendix 1, during the period January 1, 1947, to and including March 28, 1948, compared with the average carload earnings on fertilizer from Seattle, Washington, to equidistant points, during the same period.

Exam. Hall: Well, it speaks for itself.

The Witness: There is only one point, if you want to bring out the per car mile earnings; I think it explains itself.

Q. (By Mr. Tjossem): It is getting late, and [156] I think the Examiner could make the computations if he so desired. The information is there.

Exam. Hall: I will expect counsel to make the computations in the briefs.

Mr. Tjossem: We will do that.

Exam. Hall: I will be frank; if it is not important enough to put it in the briefs, I won't give it much consideration.

Mr. Tjossem: I am willing to do so, and save you the time, as well as saving the time of the hearing here.

Exam. Hall: You can put it in the brief.

Mr. Tjossem: I will be willing to do that.

Q. (By Mr. Tjossem): Will you explain Exhibit 28?

A. Exhibit 28 is a statement showing the mini-

Plaintiffs' Exhibit No. 2—(Continued)

(Testimony of H. R. Henderson.)

num revenue per car based on classification rating and minimum weight compared with minimum revenue per car based on exceptions to classification, and the tariff references are shown. In other words, this exhibit shows that, had we not made a class E and a class D exception, with varying minimums to apply on this commodity from New Westminster, British Columbia, the class D rates would have applied; and I think it is shown that we made a substantial reduction to help this industry get established in this territory.

Exam. Hall: That is the purpose of the exhibit?

The Witness: Yes.

Q. (By Mr. Tjossem): The territory that you [157] are covering is generally the Pacific Northwest? A. Yes.

Mr. Tjossem: You may cross examine.

Cross Examination

Q. (By Mr. Tolan): Are there any shipments on which we are seeking reparations moving to Seattle, Tacoma and Portland? A. No.

Q. Are any of those involved in the 6 cent maximum about which we are complaining?

A. Not Seattle, Tacoma and Portland.

Q. Are we getting the same increase that fertilizer would get on the same movement to Seattle, Tacoma or Portland?

A. Yes, it would be 20%.

Plaintiffs' Exhibit No. 2—(Continued)

(Testimony of H. R. Henderson.)

Q. What then would be the purpose of Exhibit 24 and your Exhibit 29?

A. I have already stated that,—

Q. Merely to show assistance to the industry?

A. I show that we used these rates in combination to make them to the points to which you had a movement, as shown in Appendix 1 to the complaint.

Q. Without carrying it to the point that we actually shipped, it has no probative value?

A. Yes, because it is a factor in making the rates; and this is the story as to why we did reduce the rates.

Q. When were the rates reduced? [158]

A. It shows there, January 1930, when we made the reduction.

Q. Then the rates have been established for a long period of time?

Mr. Tjossem: It speaks for itself.

Q. (By Mr. Tolan): Exhibit 26. To what areas were those fertilizer cars shipped?

A. To Oregon, Washington and Idaho.

Q. Do you have any idea of the volume of the fertilizer shipped with relation to the value and volume of peat? Let us confine it to the value?

A. Well, fertilizer is somewhat higher, I imagine.

Exam. Hall: Well, the only purpose of the exhibit is to show the average weight per carload of fertilizer is higher than that of peat; is that right?

Plaintiffs' Exhibit No. 2—(Continued)

(Testimony of H. R. Henderson.)

The Witness: Yes.

Q. (By Mr. Tolan): Exhibit 27 compares the fertilizer with peat moss rates for equidistant hauls? Do you know of any fertilizer moving from Seattle to Walla Walla, Washington?

A. Let us take all the points. As to some of the points, there was actual movement. But to strike an equidistant point, I used that point; I could have used a shorter distance than Wallair.

Q. Then the exhibit does not cover actual movements, but it is based strictly on equidistances?

A. Yes; there is a movement to points surrounding this point. [159]

Q. But you stated there were no actual movements?

A. Yes, we have to average the movements to get the actual weight.

Q. Returning to your Exhibit 24, and your Exhibit 28. What rate do we make, using a Seattle combination?

Exam. Hall: Just to get one point.

The Witness: Yakima, for instance.

Q. (By Mr. Tolan): In relation to Exhibit 28, you said a full classification would apply if you did not use the exception. How much of the freight in the Pacific Mountain territory moves on class rates?

A. I have not made a study of that.

Mr. Tolan: That's all.

Mr. Tjossem: I offer Exhibits 24 to 29.

Plaintiffs' Exhibit No. 2—(Continued)
(Testimony of H. R. Henderson.)

Exam. Hall: Exhibits 24 to 29 will be received in evidence, Witness Henderson.

(Defendants' Exhibits 24 to 29, inclusive, Witness Henderson, were received in evidence.)

Exam. Hall: That appears to be all.

(Witness excused.)

Mr. Tjossem: I will call Mr. Madsen.

FRED MADSEN

was sworn and testified as follows:

Direct Examination [160]

Q. (By Mr. Tjossem): Will you please state your name, residence and occupation?

A. My name is Fred Madsen; I am Assistant Chief Clerk, Traffic Department, Union Pacific Railroad, 751 Pittock Block, Portland, Oregon.

Q. Are you familiar with the issues in the complaint in this proceeding? A. Yes.

Q. Did you prepare some exhibits in connection with this case? A. Yes.

Mr. Tjossem: I will ask that the exhibits be marked for identification.

Exam. Hall: How many do you have?

Mr. Tjossem: Three.

Exam. Hall: They will be marked Exhibit 30, 31, and 32, Witness Madsen.

(Defendants' Exhibits 30, 31 and 32, Witness Madsen, were marked for identification.)

Q. (By Mr. Tjossem): Mr. Madsen, referring to

Plaintiffs' Exhibit No. 2—(Continued)

(Testimony of Fred Madsen.)

Exhibits 30, 31 and 32, were those prepared by you?

A. Yes.

Q. What is Exhibit 30?

A. Exhibit 30 shows the history of the rates from Seattle, [161] Washington to Idaho and Utah points in effect December 7, 1938, to May 6, 1948, as a result of the shippers' application, effective December 7, 1938, whereby a rate of 57 cents, minimum weight 30,000 pounds, was established from Seattle, Washington, to Twin Falls and Utah common points. Prior to this date, the rate from Portland to these points was 52 cents, which was the published rate from San Francisco to Utah in Pacific Freight Tariff Bureau 51K Item 7770.

Mr. Tolan: Mr. Examiner, I am going to raise an objection to this exhibit on the ground that there is no movement from Seattle, Washington, and the exhibit is irrelevant, and if we could have a ruling,—

Exam. Hall: Well, I will overrule the objection.

The Witness: The rate was first published,—the California rate was first published from Portland to Utah on August 3, 1938. Effective January 6, 1939, the rate of 57 cents was extended from Seattle to Idaho Falls, on the same basis as the Utah rates. Subsequent change is shown on account of Ex Parte increases, and are explained in the exhibit.

Q. (By Mr. Tjossem): Why did you use Seattle as the origin point in the exhibit?

A. There are no through rates to New Westmin-

Plaintiffs' Exhibit No. 2—(Continued)
(Testimony of Fred Madsen.)

ster, or from New Westminster, and those through rates are made over Seattle.

Exam. Hall: By that you mean, your through rates from New Westminster to Caldwell and Boise are made by a combination over [162] Seattle?

The Witness: Yes, sir.

Exam. Hall: And are those rates complained of in this proceeding, rates from New Westminster to Salt Lake City?

Mr. Tolan: Yes, they are.

Q. (By Mr. Tjossem): Will you explain Exhibit 31?

A. Exhibit 31 is a statement showing carload rates on manufactured fertilizer as described on the second page of the exhibit, from Seattle, Washington, to points in Idaho and Utah in effect from July 5, 1924 to May 6, 1948.

Now, these rates were first put in July 5, 1924, for the purpose of moving this commodity to the points named.

Q. By "this commodity," you mean what?

A. Fertilizer.

Q. This exhibit is simply to show comparable rates on fertilizer from Seattle to the same points shown in Exhibit 30 as to peat moss?

A. Yes, and there have been no changes since publication, except by the Ex Parte increases.

Q. What is Exhibit 32?

A. Exhibit 32 is a statement showing rates in cents per hundred pounds and average carload earn-

Plaintiffs' Exhibit No. 2—(Continued)

(Testimony of Fred Madsen.)

ings on peat carloads, from New Westminster, B. C. to destinations in Idaho and Utah, to which there was a movement as shown in Complainants' Appendix 1, during the month of January, 1947, to September, 1947, [163] compared with average carload earnings on fertilizer from Seattle, Washington to equidistance points during the same period.

Q. You show the relative earnings based on the average loads of fertilizer and peat moss during the same period? A. Yes.

Q. Have you anything further to offer?

A. Well, the average weight I used on the shipments to Idaho and Utah were 37,991 pounds, and those weights were based on the 14 cars that were handled from British Columbia points to those points, and they are shown on Page 2 of the exhibit.

Q. Those 14 cars were taken from Appendix 1 of the complaint? A. That's right.

Q. Is there anything further?

A. That's all.

Mr. Tjossem: I have nothing further.

Cross Examination

Q. (By Mr. Tolan): Did I understand you to say that all the rates from New Westminster to such points as Salt Lake City, using that as an example, were made on a combination rate over Seattle? A. Yes.

Q. Are you familiar with the transcontinental

Plaintiffs' Exhibit No. 2—(Continued)

(Testimony of Fred Madsen.)

rates, 4 Series, applying from New Westminster to Group J points? A. Yes. [164]

Q. Do you have through rates via Spokane?

A. Yes, we do.

Q. Do you know what the through rate is on that route from New Westminster to Denver? I can refresh your memory on it. 72 cents?

A. It is lower than the group rate, I believe. 72 cents, I believe, is correct.

Q. Would the 72-cent rate from Salt Lake City apply via the Great Northern to Spokane, Union Pacific via Salt Lake to Denver?

A. It would on intermediate application.

Q. Then that rate would be 72 cents? If the local rate, basic rate, from New Westminster to Seattle is 15 cents, and you added that to the 60 cent rate, wouldn't you exceed 72 cent rate? Well, it is a mathematical computation.

Exam. Hall: Suppose he had this 72 cent rate carrying an intermediate clause applicable over that route?

The Witness: It applies intermediate if the combination of locals exceeds that.

Q. (By Mr. Tolan): Therefore, to such towns as Salt Lake City, and Boise, for instance, the transcontinental ceiling would apply?

A. Yes.

Q. And then that statement that the Seattle combination applies to all points would not be correct, would it? [165]

Plaintiffs' Exhibit No. 2—(Continued)

(Testimony of Fred Madsen.)

A. Well, that transcontinental rate from New Westminster to Utah points only applies via Spokane, and not via Seattle.

Q. So far as the Union Pacific is concerned. Do you know whether there is a rate that would apply by the Great Northern, Western Pacific, and Denver and Rio Grande?

A. I have not checked that.

Q. If they produced lower charges than that, would you amend your statement regarding the exhibit? A. I would show it as a max.

Q. Rather than the combination?

A. As a max.

Q. Your Exhibit 31, showing manufactured fertilizer rates,—do you maintain westbound rates on fertilizer lower than those shown eastbound from Seattle?

A. There may be some minor changes.

Q. You emphasize the word "minor".

A. I have it here.

Q. Let me ask you this question to expedite the thing. Do you know what the sulphate of ammonia rate is to Seattle from Salt Lake City, the reverse direction of the one that you have shown here?

A. That would be 45 and,—

Q. I think you will find the correct rate to be 49. On May 6, 1948, the correct rate is 49 cents. If I said the westbound rate was 49 cents on fertilizer, would you say that that [166] is a minor reduction under the 62 cent rate?

Plaintiffs' Exhibit No. 2—(Continued)

(Testimony of Fred Madsen.)

A. Well, it speaks for itself.

Q. Do you know the value of fertilizer that is moving in this eastbound direction from Seattle?

A. No, I don't.

Q. Do you know the value of the movement from Seattle to the towns that you have named?

A. Well, we had 14 cars during 1947.

Mr. Tolan: That is all.

Redirect Examination

Q. (By Mr. Tjossem): You made the statement in response to Mr. Tolan's questioning that there might be some minor differences comparing the rates westbound and eastbound. Do you know what the rate was on sulphate of ammonia from Salt Lake City to Seattle, I believe it was, on May 6, 1948? Do you know, or did you know when you answered the question? A. I have it here.

Q. Did you know when you answered him?

A. No, but I have it.

Recross Examination

Q. (By Mr. Tolan): What is the rate?

A. According to this, it is 45 cents from Utah to Seattle, westbound rate.

Q. Is it in effect today? A. Yes. [167]

Mr. Tjossem: I offer in evidence Defendants' Exhibits 30, 31 and 32.

Exam. Hall: They will be admitted.

Plaintiffs' Exhibit No. 2—(Continued)

(Defendants' Exhibits 30, 31 and 32, Witness Madsen, received in evidence.)

(Witness excused.)

Mr. Tjossem: That completes the case of the Defendants. The Defendants rest.

Exam. Hall: Do you have any rebuttal?

Mr. Tolan: No rebuttal.

Exam. Hall: Of course there will be a proposed report. And then we have the question of briefs. Off the record.

(Discussion off the record.)

Exam. Hall: Briefs will be due January 15th, 1949. That will close the hearing in this proceeding.

(Whereupon, at 7:06 p.m., November 10, 1948, hearing closed.)

* * * * *

Interstate Commerce Commission

Filed 7/12/49

No. 29974—Acme Peat Products, Ltd., et al., vs.
The Akron, Canton & Youngstown Railroad
Company, et al.

Submitted..... Decided.....

1. Rates on ground peat, in carloads, from points in Canada to various points in the United States not shown to have resulted in charges for the hauls within the United States that were unreasonable or otherwise unlawful.

Plaintiffs' Exhibit No. 2—(Continued)

2. Rates on the same commodity, in carloads, from the same points of origin to certain points in California not shown to be unreasonable or otherwise unlawful for the hauls within the United States.

3. Complaint dismissed.

Fred H. Tolan for complainants.

A. J. Clynch, R. Paul Tjossem, Charles W. Burkett, Jr., J. E. Lyons, and Harold G. Boggs for defendants.

REPORT PROPOSED BY GEORGE J. HALL
AND L. H. DISHMAN, EXAMINERS

Complainants¹, corporations of Canada, are producers of ground peat at certain points in British Columbia, Canada. By complaint originally received April 30, 1948, they allege that the rates² charged on numerous shipments of that commodity, in carloads, which moved during the period from

¹ Acme Peat Products, Alouette Peat Products, Atkins & Durbrow, which prior to January 8, 1948, operated under the name of B. C. Peat Company, Ltd., Coast Peat Company, Excelsior Peat Company, Lulu Island Peat Company, Northern Peat Moss Company, Pacific Peat Products, Richmond Peat Products, Shaffer-Haggart, Western Peat Company, Blundell Peat Company, and Byrne Road Peat Farms. All except the last two named are limited corporations.

² Rates are stated in amounts per 100 pounds, unless otherwise indicated and do not include increases authorized after January 1, 1947.

Plaintiffs' Exhibit No. 2—(Continued)

January 1, 1947, to March 29, 1948, from certain points³ in British Columbia, of which New Westminster located on the Great Northern Railway about 20 miles north of the boundary between Canada and the United States is representative, to various points in the United States were inapplicable, unreasonable, and unduly preferential and prejudicial. Complainants also allege that the rates from the origin points herein to certain points⁴ in northern California are, and for the future will be, unreasonable and unduly preferential and prejudicial. An informal complaint covering one carload of ground peat shipped January 28, 1947, from New Westminster to Los Angeles, Calif., and containing the same allegations as those considered herein, was filed by Pacific Peat Products, Ltd., May 26, 1947, and closed March 24, 1948, as not being susceptible of informal adjustment. The Commission is asked to award reparation on all shipments of record and to prescribe rates for the future to the aforementioned California points.

Complainants suggest that proportional rates, computed on a mileage pro rata basis, be prescribed for the hauls within the United States.

Complainants contend that the rates assailed, al-

³ Queensboro, New Westminster, South Fraser St., Pitt Meadows, Fraser St., and Vancouver.

⁴ San Francisco, Port Chicago, Fresno, Petaluma, West Petaluma, Santa Rosa, Oxford, Locke, Walnut Grove, Isleton, Santa Cruz, Terminous, Monterey, Lake Najella, Salinas, and Tres Pinos, which was abandoned as a station June 26, 1948.

Plaintiffs' Exhibit No. 2—(Continued)

though published pursuant to purported authority of the Commission's order of December 5, 1946, in Increased Rates, Fares, and Charges, 1946, 266 I.C.C. 537,⁵ did in fact exceed the rates authorized by that order. The sole issue complainants assert, is whether the defendants in publishing increases in their rates on ground peat observed the limitations in the Commission's findings and order in that proceeding.

In view of the fact that Ex Parte No. 162 was a proceeding nationwide in scope, involving every commodity transported by rail, the Commission could only set forth in general terms how the increases it allowed should be applied. It stated with reference thereto at page 618 in the appendix as follows:

Basic freight rates, whether class or commodity, and charges, on the commodities hereinafter specified, may be increased in the amounts and in the manner set forth as to each commodity class or group. The commodity group numbers (or commodity class numbers) used in this appendix, and throughout the entire report and order, for convenience, are those specified in the order of division 4 of November 22, 1927, In the Matter of Freight Commodity Statistics, which was in effect at the date of the submission herein, although a new list of commodity classes with articles assigned thereto has been promulgated by order of division

⁵ Hereinafter termed Ex Parte No. 162.

Plaintiffs' Exhibit No. 2—(Continued)

1, September 24 and October 16, 1946, to become effective January 1, 1947. They are intended generally to cover the items customarily included by the carriers in their reports to the Commission under each numbered description, as of the date for the submission.

In the case of rates on Fertilizers, N.O.S.,⁶ Group 640, an increase of 20 percent, subject to a maximum of 6 cents, or \$1.20 per net ton, was authorized by the Commission in the above-mentioned proceeding. Although peat, ground or unground, *in* included in the group of commodities listed under Group 640, the carriers, in publishing rates as authorized in Ex Parte No. 162, published a 6-cent maximum increase in rates on peat when that commodity was carried in the tariffs in the fertilizer group, N.O.S., but in instances where it was not included in the tariffs as fertilizer, N.O.S., but under a separate commodity rate, the full 20 percent increase, authorized therein on all basic freight rates generally, was published. As the rates applying on peat from points in British Columbia to destinations in the United States were separate commodity rates they were, on January 1, 1947, made subject to the full 20 percent increase. The rates sought are the basic rates in effect January 1, 1947, increased in the same manner and to the same extent as the rates on fertilizers, N.O.S.

The matter of increases under Ex Parte No.

⁶ Not otherwise specified.

Plaintiffs' Exhibit No. 2—(Continued)

162 was later given further consideration on representation that rates on peat from origins in eastern Canada to points in the United States east of the Mississippi River were on the fertilizer basis and were increased a maximum of only 6 cents as contrasted with the maximum increase of 20 percent in the rates applying from points in British Columbia herein assailed. As a result thereof, defendants modified their tariffs in the various rate territories, between December 1, 1947, and March 29, 1948, to reflect a maximum increase of 6 cents in the rates on peat. However, prior to March 29, 1948, when defendants amended their master increase tariff⁷ to show the 6-cent maximum increase applicable to rates on peat, they republished rates thereon from the considered origins to points in northern California, hereinbefore referred to, adding to the basic rates the full 20 percent increases, and withdrawing those rates from the master increase tariff. Those are the only rates now in effect assailed by complainants.

The ground peat herein considered, is produced from moss litter dug from peat bogs in British Columbia and dried by the so-called hydraulic process. There are two varieties of ground peat; the horticultural variety and the poultry litter variety. The only difference between the two varieties is that the former is more finely ground than the

⁷ Tariff of increased rates and charges No. X-162-A, Agent L. E. Kipp's I.C.C. A-3676, Supplement 19.

Plaintiffs' Exhibit No. 2—(Continued)

latter. Approximately 70 percent of the ground peat shipped by complainants to destinations in the United States is the horticultural variety. The principal consuming areas are California and the middle west, south and west of Chicago. It is shipped in bales weighing about 93 pounds per bale. Its approximate value is from \$1.75 to \$1.80 per bale.

Ground peat when mixed with soil adds only negligibly to the food value thereof. The actual effect of the mixing is the conditioning of the soil rather than the addition of food for plants. It helps the soil to retain moisture and has the effect of making adobe soil pliable and mellow. Peat holds water like a sponge. In 1929, one of the complainants herein, when attempting to obtain rates on peat lower than those applying on fertilizers, represented to certain defendants herein that this commodity was not in fact a fertilizer and that it was used extensively as poultry litter and for other purposes not in connection with the growing of plants, such as packing for certain vegetables. In view of the foregoing defendants are of the view that peat is not a fertilizer and that the rates thereon were properly increased the full 20 percent as authorized in Ex Parte No. 162 on basic freight rates generally.

Complainants contend that as peat is included in Commodity Group 640, previously referred to, defendants were not authorized by the order entered in Ex Parte No. 162 to increase the rates thereon

Plaintiffs' Exhibit No. 2—(Continued)

by amounts greater than the increases applied to the rates on fertilizers, N.O.S. Assuming that complainants are correct in their contention, it does not follow that the increased rates, complained of were thereby unreasonable or otherwise unlawful in violation of the Interstate Commerce Act. The findings of the Commission in that proceeding were permissive as indicated by finding 15, (266 I.C.C. 537, at page 617) as follows:

Rates and charges increased as herein permitted are not considered as prescribed rates, within the meaning of *Arizona Grocery Co. vs. Atchison T. & S. F. Ry. Co.*, 284 U.S. 370.

In *Wisconsin Mfts' Assn. vs. Ahnapee & W. Ry. Co.*, 272 I.C.C. 497, wherein a somewhat similar issue was involved, division 3 said at page 500:

One of the duties of defendants is to initiate rates. In publishing rates under permissive or mandatory orders of the Commission, it frequently occurs that the carriers propose other changes in rates not specifically authorized or required by the findings in the particular proceedings. Such rates are subject to protest and suspension if they are considered to be unlawful.

No protests were filed by the complainants herein when the increased rates were published by the carriers under authority of the findings in *Ex Parte No. 162*, or when the carriers republished rates on peat from the considered origins to points in northern California, whereby the 20 percent in-

Plaintiffs' Exhibit No. 2—(Continued)

increase was added to the basic rates and withdrawn from the master increase tariff.

Clearly the rates assailed were not inapplicable as complainants contend. The Commission has frequently found that where tariffs are tendered to, and accepted by it they became the only lawful rates applying to the commodities included therein, even though technically they should have been rejected upon tender. *Brown & Sons Lumber Co. vs. L. & N. R.R. Co.*, 37 I.C.C. 507. In *Kansas City Fuel Co. vs. Atchison, T. & S. F. Ry. Co.*, 210 I.C.C. 134, division 3 said at page 136: "A rate published in a tariff on file with the Commission even though in contravention of its order would still be the legal rate."

Other than showing that the rates assailed were increased by greater amounts than the rates on fertilizers, complainants offered no substantial evidence in support of their allegation of unreasonableness. They point out that in certain cases the Commission has held that carrier application of rates in excess of those authorized by it were unreasonable. In those cases, however, it was found that the basic rates to which the authorized increases applied were maximum reasonable rates. *Wisconsin Retail Lumbermen's Assn. vs. Ann Arbor R. Co.*, 241 I.C.C. 400. *Adams Lbr. Co. vs. Akron C. & Y. Ry. Co.*, 253 I.C.C. 179. There is nothing of record in the instant case to indicate that the basic rates on peat, established to meet competitive conditions, were maximum reasonable

Plaintiffs' Exhibit No. 2—(Continued)

rates. On the contrary, the evidence discloses that to California destinations, for example, that if the original rates established in 1937 and increased in 1938 had been subject to no voluntary reductions and had been increased by all general increases authorized by the Commission, they would have been substantially higher than the rates assailed. The new basic rates on peat to points in northern California, hereinbefore referred to, were published January 1, 1948, pursuant to the suggestion made in All Rail Commodity Rates Between Calif., Oreg. and Wash., 268 I.C.C. 515. In that proceeding the Commission permitted the rail carriers to increase a specified list of commodity rates by about 4 percent more than the rates resulting from application of Ex Parte No. 162 increases. It was stated therein at page 545 that the rail carriers might propose similar increases on their other class and commodity rates. As a matter of carrier policy, a similar increase was not made in the rates applying to points in southern California as those rates then would have exceeded the transcontinental rate to points in the middle northwest. The rate to San Francisco, for example, is now 8 cents lower than the rate to Los Angeles.

It is contended by complainants that the voluntary reduction by defendants of all the rates on peat, except those to points in northern California, subsequent to the dates of the shipments involved herein shows the prior rates were unreasonable and that reparation should be awarded. The Com-

Plaintiffs' Exhibit No. 2—(Continued)

mission, however, has frequently found that the voluntary reduction of rates does not of itself justify the conclusion that the pre-existing rates were unreasonable or afford a basis for reparation. *Providence Fruit & Produce Exch. vs. N. Y., N. H., and H. R. R. Co.*, 142 I.C.C. 179.

In support of the allegation of undue preference and prejudice, complainants assert that they ship peat to points in the United States east of Chicago in competition with producers of that commodity located at points in eastern Canada and in the eastern part of the United States and that during most of the year 1947 the full 20 percent increase was applied to their rates, whereas the rates from the alleged preferred points were increased a maximum of only 6 cents. To those consuming points, the distances from the origins herein average about 3,500 miles as compared with an average of only 1,000 miles from the alleged preferred points. In addition to the handicap of distance in reaching the eastern markets, the record shows that complainants encounter severe competition there by producers of peat substitutes, such as sugar cane products, straw and corn cobs. There was a change in rate relations when the *Ex Parte* No. 162 increases were published, but there is nothing of record to indicate that the rates were properly related before the change or improperly related thereafter. General declarations as to competition or injury, unsupported by evidentiary facts, and a mere showing of disparity of rates are not sufficient

Plaintiffs' Exhibit No. 2—(Continued)

for a finding of undue preference and prejudice. R. C. Williams & Co., Inc., vs. New York Central R. Co., 269 I.C.C. 297. Rheem Mfg. Co. vs. Chicago R. I. & P. Ry. Co., 273 I.C.C. 185. The evidence of record does not establish the existence of undue prejudice.

Upon this record the Commission should find that the rates assailed are not shown to have been, or to the points in California, hereinbefore named, to be, unreasonable or otherwise unlawful for the hauls within the United States. The complaint should be dismissed.

* * * * *

Interstate Commerce Commission

Filed 4/17/50

No. 29974¹—Acme Peat Products, Ltd., et al., vs. Akron, Canton & Youngstown Railroad Company, et al.

Submitted Nov. 17, 1949

Decided April 7, 1950

1. Increased rates on ground peat, in carloads, from points in British Columbia, Canada, to points in the United States, found to have resulted in charges for hauls within the United States that were unjust and unreasonable. Reparation awarded.

¹ This report also embraces No. 30260, Alouette Peat Products, Ltd. vs. The Atchison, Topeka and Santa Fe Railway Company.

Plaintiffs' Exhibit No. 2—(Continued)

2. Increased rates on like traffic to certain points in California found to result in charges for hauls within the United States that are unjust and unreasonable. Unauthorized increases ordered removed.

Fred H. Tolan for complainants.

A. J. Clynch, R. Paul Tjossem, Charles W. Burkett, Jr., J. E. Lyons, and Harold G. Boggs for defendants.

REPORT OF THE COMMISSION

Division 2, Commissioners Aitchison, Splawn, and Alldredge by Division 2:

Exceptions to the examiners' proposed report were filed by complainants, and we have heard the parties in oral argument. Exceptions and requested findings not discussed in this report nor reflected in our findings or conclusions have been given consideration and found not justified.

Complainants,² in No. 29974, Corporations of Canada, are producers of ground peat at certain points in British Columbia, Canada. By complaint

² Acme Peat Products, Alouette Peat Products, Atkins & Durbrow, which prior to January 8, 1948, operated under the name of B. C. Peat Company, Ltd., Coast Peat Company, Excelsior Peat Company, Lulu Island Peat Company, Northern Peat Moss Company, Pacific Peat Products, Richmond Peat Products, Shaffer-Haggart, Western Peat Company, Blundell Peat Company, and Byrne Road Peat Farms. All except the two last named are limited corporations.

Plaintiffs' Exhibit No. 2—(Continued)

originally received April 30, 1948, they allege that the rates charged on numerous shipments of that commodity, in carloads, which moved on and between January 1, 1947, and March 29, 1948, from certain points³ in British Columbia, of which New Westminster, on the line of the Great Northern Railway Company about 20 miles north of the boundary between Canada and the United States, is representative, to points in the United States, were inapplicable, unjust and unreasonable, and unduly preferential and prejudicial. Complainants also allege that the rates from these origins to certain points⁴ in northern California are and for the future will be, unjust and unreasonable, and unduly preferential and prejudicial. We are asked to award reparation and to prescribe lawful rates for the future to the northern California points.

Complainant in No. 30260, a corporation of Canada, filed its complaint on May 31, 1949. It contains the same allegations and prayer for relief, with respect to shipments of peat moving to points in the United States from Pitt Meadows, British Columbia, Canada, as are made in the complaint in No. 29974. By stipulation of the parties, that pro-

³ Queensboro, New Westminster, South Fraser St., Pitt Meadows, Fraser St., and Vancouver.

⁴ San Francisco, Port Chicago, Fresno, Petaluma, West Petaluma, Santa Rosa, Oxford, Locke, Walnut Grove, Isleton, Santa Cruz, Terminous, Monterey, Lake Najella, Salinas, and Tres Pinos. The point last named was abandoned as a station on June 26, 1948.

Plaintiffs' Exhibit No. 2—(Continued)

ceeding has been submitted upon the record as made in No. 29974.

Complainants contend that increases in amounts exceeding 6 cents per 100 pounds in the rates assailed, although stated to be published pursuant to authority granted by the Commission on December 5, 1946, were and are in fact increases exceeding those so authorized. The sole issue, complainants assert, is whether the defendants in publishing increased rates on ground peat should have observed the amount of 6 cents as the maximum increase authorized for specified commodities.

The Commission set forth in general terms how the general increases authorized December 5, 1946, should be applied. In the appendix to the report, 266 I.C.C. at page 618, it stated:

Basic freight rates, whether class or commodity, and charges, on the commodities hereinafter specified, may be increased in the amounts and in the manner set forth as to each commodity class or group. The commodity group numbers (or commodity class numbers) used in this appendix, and throughout the entire report and order, for convenience, are those specified in the order of division 4 of November 22, 1927, In the Matter of Freight Commodity Statistics, which was in effect at the date of the submission herein, although a new list of commodity classes with articles assigned thereto has been promulgated by order of division 1, September 24 and October 16, 1946, to become effective January 1, 1947. They are intended

Plaintiffs' Exhibit No. 2—(Continued)

generally to cover the items customarily included by the carriers in their reports to the Commission under each numbered description, as of the date for the submission.

In the case of rates on fertilizers n.o.s.,⁵ group 640, an increase of 20 percent, subject to a maximum of 6 cents per 100 pounds or \$1.20 per net ton, was authorized. Although peat, ground or unground, is included in the group of commodities listed under group 640, the carriers, in publishing increased rates as authorized, published a 6-cent maximum increase in rates on peat only when that commodity was carried in the tariffs in the fertilizer group. In instances where a separate commodity rate was published for peat, the full 20 percent increase, authorized on basic freight rates generally, was published. As the rates applying on peat from points in British Columbia to destinations in the United States were separate commodity rates, they were, on January 1, 1947, made subject to the full 20 percent increase. The rates sought are the basic rates in effect prior to January 1, 1947, increased in the manner that rates on fertilizers were increased.

The carriers gave the matter of increases further consideration on representations that rates on peat from origins in eastern Canada to points in the United States east of the Mississippi River were on the fertilizer basis and were increased a maximum

⁵ Not otherwise specified.

Plaintiffs' Exhibit No. 2—(Continued)

of 6 cents. As a result thereof, defendants reduced the transcontinental rates on peat between and on December 1, 1947, and March 29, 1948, to reflect a maximum increase of 6 cents. However, prior to March 29, 1948, when defendants amended their master tariff⁶ to show the 6-cent maximum increase applicable to rates on peat, they republished rates thereon from the origins in British Columbia to points in northern California hereinbefore referred to, adding to the basic rates the full 20 percent increase, and withdrawing those rates from the application of the master tariff. Those are the only rates now in effect that are assailed by complainants.

The ground peat herein considered, is produced from moss litter dug from peat bogs in British Columbia and dried. There are two varieties of ground peat; the horticultural variety and the poultry litter variety. The only difference between the two varieties is that the former is more finely ground than the latter. Approximately 70 percent of the ground peat shipped by complainants to destinations in the United States is the horticultural variety. The principal consuming areas are California and the Middle West, south and west of Chicago. It is shipped in bales weighing about 93 pounds per bale. Its approximate value is from \$1.75 to \$1.80 per bale.

⁶ Tariff of increased rates and charges No. X-162-A, Agent L. E. Kipp's I.C.C. A-3676, Supplement 19.

Plaintiffs' Exhibit No. 2—(Continued)

Ground peat when mixed with soil adds only negligibly to the food value thereof. The actual effect of the mixing is the conditioning of the soil rather than the addition of food for plants. It helps the soil to retain moisture and has the effect of making adobe soil pliable and mellow. Peat holds water like a sponge. In 1929, one of the complainants herein, when attempting to obtain rates on peat lower than those applying on fertilizers, represented to certain defendants herein that this commodity was not in fact a fertilizer and that it was used extensively as poultry litter and for other purposes not in connection with the growing of plants, such as packing for certain vegetables. In view of the foregoing, defendants are of the view that peat is not a fertilizer and that therefore the rates thereon were properly increased the full 20 percent, without exception.

Complainant's contention that the rates assailed were not applicable has no merit. Where tariffs are tendered to and accepted by the Commission, the rates therein become applicable, even though technically they should have been rejected upon tender. *Brown & Sons Lumber Co. vs. Louisville & N. R. R. Co.*, 37 I.C.C. 507. In *Kansas City Fuel Oil Co. vs. Atchison, T. & S. F. Ry. Co.*, 210 I.C.C. 134, division 3 said at page 136: "A rate published in a tariff on file with the Commission even though in contravention of its order would still be the legal rate."

Defendants were not authorized to increase the rates on commodities embraced in group 640 by

Plaintiffs' Exhibit No. 2—(Continued)

amounts exceeding 6 cents per 100 pounds. As ground peat was specifically included in that group, such increases in the rates thereon were not within the authority given. The schedules containing the unauthorized increases, published on short notice, were not received by complainants in time for protest and suspension.

Defendants rely upon evidence tending to show that the basic rates on peat were not maximum reasonable rates. To California destinations, for example, if the original rates established in 1937 and increased in 1938 had not been voluntarily reduced and had been subjected to all authorized general increases, they would have been substantially higher than the rates assailed. The new basic rates on peat to points in northern California, hereinbefore referred to, were published January 1, 1948, pursuant to a suggestion made in All Rail Commodity Rates Between Calif., Oreg., and Wash., 268 I.C.C. 515. In that proceeding the Commission permitted the rail carriers to increase rates on a specified list of commodities by about 4 percent more than the rates resulting from application of the increases authorized December 5, 1946. The rates were affected by competition with transportation by water. It was stated therein, at page 545, that the rail carriers might propose similar increases on their other class and commodity rates. As a matter of carrier policy, a similar increase was not made in the rates applying to points in southern California as those rates then would have exceeded the trans-

Plaintiffs' Exhibit No. 2—(Continued)

continental rates to points in the Middle Northwest. Commodity rates to the Chicago, Ill., area and destinations west thereof were published effective April 2, 1936, because of competition with peat imported from Sweden and Germany, and in 1940 rates to other destinations were graded with relation to the rate to the Chicago area. It is also indicated that competition with peat from Wisconsin, Michigan and other eastern States affects the trans-continental rate level. An increase of 5 cents per 100 pounds on December 24, 1936, was removed effective March 1, 1937.

The evidence introduced by defendants in an attempt to establish the reasonableness of the assailed rates as increased misses the crux of the issue here presented. These rates were increased by defendants under color of approval by this Commission in a general revenue proceeding in which authority was sought, because of an emergency, to depart from the usual method of rate publication and to reduce the statutory filing time for the tariffs. The latter requests were granted and increases in the general body of rates, designed to afford additional revenue to the carriers, were authorized, subject to certain specific holddowns in rates which were prescribed for the purpose of avoiding unnecessary disturbances in rate and market relations. The reasonableness of the increases to be made in the rates on peat was there definitely determined. The proper course for defendants to have taken, if they were dissatisfied with the maximum to which the in-

Plaintiffs' Exhibit No. 2—(Continued)

increases in the rates on peat authorized were made subject, would have been to file a petition for reconsideration or rehearing in the proceeding in which it was prescribed. They had no right to proceed otherwise.

In publishing the rates on peat here considered, however, defendants disregarded the maximum which the Commission had prescribed in connection with its approval of a percentage increase. As these increases were named in tariffs which became effective on short notice, complainants were prevented from exercising the statutory right that otherwise would have been available to enter protest before the increased rates took effect. It is our opinion that the complainants, who paid the unauthorized increases, are entitled, under the Interstate Commerce Act, to be placed in the same situation in which they would have been had the defendant carriers complied with our order. Section 1 requires that rates and charges be both just and reasonable. As the Commission said in *Reparation as Relating to Increase of Rates*, 68 I.C.C. 5, 6, decided March 14, 1922:

We have often recognized the principle that the words "just and reasonable" imply the application of good judgment and fairness, of common sense and a sense of justice, to the facts of record. The words "just and reasonable" are not fixed unalterable mathematical terms. *Advances in Rates on Coal by the C. & O. Ry. Co.*, 22 I.C.C. 604.

In the instant proceeding, the collection by de-

Plaintiffs' Exhibit No. 2—(Continued)

defendants of charges which included increases in excess of those authorized by the Commission clearly resulted in unjust enrichment of defendants at complainants' expense. It follows that reparation on past shipments to the extent of this unjust enrichment is warranted, and that a reduction to the same extent in the assailed rates now maintained to points in northern California which include the unauthorized increases should be required.

In support of the allegation of undue preference and prejudice, complainants assert that they ship peat to points in the United States east of Chicago in competition with producers of that commodity located at points in eastern Canada and in the eastern part of the United States; that during most of the year 1947 the full 20 percent increase was applied to their rates, whereas the rates from the alleged preferred points were increased a maximum of 6 cents; and that their prices could not be correspondingly increased. To those consuming points, the distances from the origins herein average about 3,500 miles, as compared with an average of only 1,000 miles from the alleged preferred points. Complainants encounter competition also with peat substitutes, such as sugar cane products, straw, corn cobs and ground bark. The differences between the assailed and alleged preferential rates are not shown to have been or to be of a character justifying a finding that certain defendants having effective control of the rates subjected or subject complainants to undue prejudice. Compliance with our

Plaintiffs' Exhibit No. 2—(Continued)

order will remove cause for complaint.

We find that the assailed rates were applicable, but that they resulted in charges for hauls within the United States that were unjust and unreasonable to the extent that they included increases herein found not authorized.

We further find that the assailed rates to points in northern California result in charges for hauls within the United States that are and for the future will be unjust and unreasonable to the extent that they include or may include increases herein found not authorized.

We further find that complainants made shipments as described and paid the charges thereon at the rates herein found unjust and unreasonable, and that they were damaged thereby and are entitled to reparation in the amount of the difference between the charges paid and those herein found just and reasonable, with interest. Complainants should comply with rule 100 of the General Rules of Practice.

An order will be entered requiring the removal of unauthorized increases in the rates to points in California.

ORDER

At a Session of the Interstate Commerce Commission, Division 2, held at its office in Washington, D. C., on the 7th day of April A.D. 1950.

No. 29974—Acme Peat Products, Ltd., et al., vs.

Plaintiffs' Exhibit No. 2—(Continued)

The Akron, Canton & Youngstown Railroad Company, et al.

No. 30260—Alouette Peat Products, Ltd., vs. The Atchison, Topeka and Santa Fe Railway Company, et al.

These proceedings being at issue upon complaint and answers on file and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been made, and said division having, on the date hereof, made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof:

It is ordered, That the defendants named in the complaints, according as they participate in the transportation, be, and they are hereby, notified and required to cease and desist, on or before July 18, 1950, and thereafter to abstain from publishing, demanding, or collecting for the transportation within the United States of the traffic referred to in the next succeeding paragraph hereof rates exceeding those found just and reasonable in the report made a part hereof.

It is further ordered, That the said defendants, according as they participate in the transportation, be, and they are hereby, notified and required to establish on or before July 18, 1950, upon notice to this Commission and to the general public by not less than 30 days' filing and posting in the manner prescribed in section 6 of the Interstate Commerce

Plaintiffs' Exhibit No. 2—(Continued)

Act, and thereafter to maintain and apply to the transportation within the United States of ground peat, in carloads, from points in British Columbia, Canada, to points in northern California named in the report made a part hereof, rates which shall not exceed those found just and reasonable in said report.

By the Commission, division 2.

[Seal] W. P. Bartel, Secretary

* * * * *

Filed 6/22/50

Before the Interstate Commerce Commission

No. 29974—Acme Peat Products, Ltd., et al., Complainants, vs. The Akron, Canton & Youngstown Railroad Company, et al., Defendants.

No. 30260—Alouette Peat Products, Ltd., Complainant, vs. The Atchison, Topeka and Santa Fe Railway Company, et al., Defendants.

PETITION OF DEFENDANTS FOR RECONSIDERATION BY THE ENTIRE COMMISSION AND FOR ARGUMENT

The defendant railway companies respectfully petition this Commission to reopen these proceedings for reconsideration by the entire Commission, and to accord oral argument.

By petition dated May 26, 1950, the defendants

Plaintiffs' Exhibit No. 2—(Continued)

requested that the effective date of the Order of Division 2 dated April 7, 1950, be postponed, and we are now advised by the Chief Examiner of the Commission that the effective date of the Order has been postponed to September 29, 1950.

The defendants are prompted to file this petition, as we respectfully submit Division 2 erred in entering its Order of April 7, 1950, in the following particulars:

Division 2 erred:

(1) in concluding that the carriers in publishing the rates condemned by Division 2 did so in disregard of the maximums which the Commission prescribed in Ex parte 162, 266 I.C.C. 537;

(2) in awarding reparations without finding that the rates condemned are excessive or otherwise discriminatory or prejudicial;

(3) in asserting the authority to prescribe through rates from Canada to destinations in Northern California, as this Commission lacks authority to prescribe such rates;

(4) in asserting the authority to award reparations to the complainants when the complainants failed to show that they were in any way damaged by the collection of the charges ordered refunded.

The Order of Division 2 is contrary to numerous prior decisions of this Commission, and is contrary to recent decisions by Division 3 reaffirming the prior decisions of this Commission.

We therefore respectfully except to the following statements of Division 2:

Plaintiffs' Exhibit No. 2—(Continued)

1. "Defendants were not authorized to increase the rates on commodities embraced in group 640 by amounts exceeding 6 cents per 100 pounds" (Sheet 5).
2. "The evidence introduced by defendants in an attempt to establish the reasonableness of the assailed rates as increased misses the crux of the issue here presented. These rates were increased by defendants under color of approval by this Commission in a general revenue proceeding in which authority was sought, because of an emergency, to depart from the usual method of rate publication and to reduce the statutory filing time for the tariffs" (Sheet 7).
3. "The reasonableness of the increases to be made in the rates on peat was there definitely determined. The proper course for defendants to have taken, if they were dissatisfied with the maximum to which the increases in the rates on peat authorized were made subject, would have been to file a petition for reconsideration or rehearing in the proceeding in which it was prescribed. They had no right to proceed otherwise" (Sheet 7).
4. "It is our opinion that the complainants, who paid the unauthorized increases, are entitled, under the Interstate Commerce Act, to be placed in the same situation in which they would have been had the defendant carriers complied with our order. Section 1 requires that rates and charges be both just and reasonable. As the Commission said in Re-

Plaintiffs' Exhibit No. 2—(Continued)

paration as Relating to Increase of Rates, 68 I.C.C. 5, 6, decided March 14, 1922:

“‘We have often recognized the principle that the words “just and reasonable” imply the application of good judgment and fairness, of common sense and a sense of justice, to the facts of record. The words “just and reasonable” are not fixed unalterable mathematical terms. Advances in Rates on Coal by the C. & O. Ry. Co., 22 I.C.C. 604.’

“In the instant proceeding, the collection by defendants of charges which included increases in excess of those authorized by the Commission clearly resulted in unjust enrichment of defendants at complainants' expense. It follows that reparation on past shipments to the extent of this unjust enrichment is warranted, and that a reduction to the same extent in the assailed rates now maintained to points in northern California which include the unauthorized increases should be required.” (Sheets 7 and 8).

The defendants also except to the conclusions of the Division that the complainants are entitled to reparations, and that the rates assailed applying from British Columbia origins to Northern California are unlawful and should be cancelled.

Statement of the Case

In our opening brief in this proceedings we made a detailed statement of the case, and Division 2 has accurately set forth the issues and the factual matters appearing of record, and we will not bur-

Plaintiffs' Exhibit No. 2—(Continued)

den our Petition by again setting forth the case in detail.

Division 2 accurately states on Sheet 3 that, "The sole issue, complainants assert, is whether the defendants in publishing increased rates on ground peat should have observed the amount of 6 cents as the maximum increase authorized for specified commodities."

The complainants have never asserted in this proceedings that the rates assailed were excessively high, and their only complaint with respect to the reasonableness of the rates is that the defendants were not authorized by the Commission's order in Ex parte 162 to increase the rates on peat to the full extent of 20 per cent, and were required to limit the increases to 6 cents per 100 pounds. There has been no claim that the assailed rates are excessive, nor can there be, as the record demonstrates that the assailed rates are low. Had the defendants voluntarily initiated the assailed rates on statutory notice, their level is such that we feel we can state without fear of contradiction that had the complainants protested the schedules on the grounds that the rates therein named were excessively high or were otherwise unlawful, the Commission would have rejected the protest and permitted the rates to take effect on statutory notice. We also believe we can assert without fear of contradiction that had there been no basis for contending that the carriers had violated the Commission's order in Ex parte

Plaintiffs' Exhibit No. 2—(Continued)

162, this complaint would never have been filed.

The issue tendered to Division 2 by these complainants and which is now before this Commission, is simply this: Can the Commission, and will the Commission, condemn rates and award reparations when no contention is made that the rates are excessively high and no attack is made on the level of the rates as such, and when the sole contention of the complainants is that the carriers were not authorized to publish the assailed rates? Division 2 answered Yes.

Division 2 concluded that the defendants were not authorized by the Commission to publish the rates here assailed, and because of this, and this alone, say that the carriers in collecting the alleged unauthorized rates were unjustly enriched at the expense of the complainants. The Division assumes that the carriers were enriched and that the claimed enrichment was unjust, without giving any consideration as to whether the charges collected were excessive or exceeded a fair charge for the service rendered by the carriers, or the value of these services to these complainants. The complainants produced no evidence to show that the charges were excessive, and the undisputed evidence of record demonstrates that the assailed rates are low. Division 2 did not find and could not find that the assailed rates were excessive or in violation of Sections 2 and 3, and consequently should have dismissed the complaint.

Plaintiffs' Exhibit No. 2—(Continued)

The Defendants Did Not Violate the Order of the Commission in Ex Parte 162 in Publishing the Assailed Rates.

Division 2 in its report has accurately summarized the action taken by the defendants in publishing the assailed rates following the effective date of the Commission's order in Ex parte 162. It is the position of Division 2 that from the language quoted in their report from the Commission's decision in Ex parte 162 at page 618 set forth on Sheet 3 of the Order herein, that the defendants were not permitted to deviate from the commodity grouping therein specified, and if a commodity was reported in a commodity grouping and the increases authorized as to that commodity grouping were subject to a maximum increase, the carriers could not publish any increase as to any commodity higher than the maximum imposed.

We are unable to agree with Division 2 that their conclusion is proper in light of the language used by the Commission. Had the Commission intended that the carriers were not to deviate from the maximums imposed in accordance with the commodity groupings, and that the increases permitted by the order in Ex parte 162 were to be uniformly and without exception applied to the commodities as they fall within the statistical grouping, we submit the Commission should not have included the last sentence set forth in the quoted paragraph. That sentence reads as follows:

Plaintiffs' Exhibit No. 2—(Continued)

"They are intended generally to cover the items customarily included by the carriers in their reports to the Commission under each numbered description, as of the date for the submission."

The word "they" obviously refers to the increases permitted by the Order; hence by this quoted sentence the Commission stated that the increases permitted were intended generally to cover the items customarily included by the carriers in their reports. Had the quoted sentence not been included in the paragraph, it would have been completely clear that the Commission intended that there would be no deviation from the statistical grouping, and if a given commodity fell within a grouping as to which the Commission imposed a maximum increase, the maximum increase would apply and there would be no excuse for having increased a commodity beyond the maximum permitted. We submit, therefore, that had the Commission intended the result now stated by Division 2, it could have unequivocally stated this requirement by the deletion from the paragraph of the quoted sentence.

In this connection we would like to point out that it was not the duty of the defendants to ascertain from the language of the Commission what was in the mind of the authors of the order when they included the quoted paragraph from the Commission's report in Ex parte 162. It can only be that it was the duty of the defendants to fairly interpret the language of the Commission, and if the interpretation placed on the language is reason-

Plaintiffs' Exhibit No. 2—(Continued)

able and fair, it cannot be said that the carriers in adopting a course of conduct pursuant to their interpretation acted in violation of the order.

We submit it is fair to conclude from the language in the quoted paragraph that there would be instances where the carriers would and should deviate from the statistical grouping of commodities in applying the increases authorized. It would appear to us that if this were not so, the Commission would not have included the last sentence in the paragraph. Certainly by inserting the last sentence of the paragraph the Commission stated that the increases permitted were to generally apply to the commodities as grouped for statistical purposes. The use of the word "generally" imports the existence of exceptions.

The Georgia court, in construing a statute providing that an instrument under seal generally imports a consideration, in concluding that by the use of the word "generally" in the statute the framers indicated that there would be exceptions to the general rule and permitted a showing that the contract even though under seal was without consideration, stated:

"In the absence of binding authority, therefore, to the contrary, we must believe that, by the use of the word 'generally' in the Code section, it was at least intended to provide for exceptions from the general rule which conclusively presumes a consideration where an instrument is executed under seal * * *." *Sims vs. Scheussler*, 64 S.E. 99, at 102.

Plaintiffs' Exhibit No. 2—(Continued)

It is not here contended that the defendants did not generally apply the Commission's order in Ex parte 162. There is no dispute as to what action was taken by the carriers with respect to publishing increases which resulted in the assailed rates, and Division 2 has accurately described the action taken by the carriers, which was that when peat moss was carried in the tariffs under the fertilizer grouping, the increases applying on these rates were limited to 6 cents per 100 pounds, and when peat moss appeared in the tariffs as a separate named commodity it was given a full 20 per cent increase.

We submit that the defendants not only acted under color of authority in publishing the assailed rates, but were in fact authorized to increase the rates in the manner in which they did.

The Defendants' Action, Even If Wrongful, Does
Not Entitle Complainants To Relief.

If we assume that Division 2 is correct and that it can be properly found that the carriers in increasing the rates in the manner in which they did were only acting under color of right and were not authorized to increase the rates to the full extent of 20 per cent, as the Commission has consistently pointed out, this fact, if it be the fact, will not in itself condemn the rates.

Division 2 admits as it must, see Sheet 5, that the rates here assailed are the applicable rates and were the only rates that could be applied to the movements here in question; that where tariffs are

Plaintiffs' Exhibit No. 2—(Continued)

tendered and accepted by the Commission, the rates named become applicable even though technically the tariff should have been rejected. The cases cited by Division 2 sustain their statement to this effect.

In the case of *Greene Cananea Copper Co. vs. Director General*, 80 I.C.C. 121, the Commission said:

“Complainant urges further that these rates were unlawful because not made in accord with the intention of General Order No. 28 and other instructions issued by the director general prior to June 25, 1918. In *Citizens Coal Mining Co. vs. Director General*, 66 I.C.C. 271, we said ‘The controlling fact to be determined is not whether the rate was increased in strict compliance with the terms of the intention of General Order No. 28, but whether the resulting rate was unreasonable or otherwise unlawful’.”

And in *Increased Rates, 1920*, 58 I.C.C. 220, the Commission stated:

“No such authority was granted. Therefore, in making the increases in question effective upon less than statutory notice, defendants failed to observe the provisions of section 6 of the interstate commerce act, but as we accepted supplement No. 4 for filing, the rates named therein became the only lawful rates which could have been applied on the traffic in question,” citing *Brown & Sons Lumber Co. vs. L. & N.R.R. Co.*, 37 I.C.C. 507.

On the same issue as is presented here, Division 3 in *Wisconsin Mfrs. Assn. vs. Ahnapee & W. Ry.*

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Co., 272 I.C.C. 497, rejected the doctrine that the fact rates are not authorized would in itself condemn the rates. In that case it was contended, as is contended here, that the sole issue was whether the defendant carriers in publishing increases of rates in their tariffs 162 and 162-A observed the limitations of the Commission's findings and order in *Ex parte* 162, and Division 3 said that it could be assumed that the complainant was correct in its contention, and having found that the rates were not unreasonable or otherwise unlawful dismissed the complaint.

In *Barshop vs. A. T. & S. F. Ry., et al.*, 277 I.C.C. 17, Division 3, in rejecting a similar contention, stated:

"Unreasonableness may not be based upon what the carriers did when they were complying with the Commission's findings and orders. In the absence of other evidence tending to show unreasonableness, such as volume of movement, value, or ton-mile and car-mile earnings, this record will not support a finding that the applicable rates exceeded or exceed the maximum limit of reasonableness."

Division 3, in so holding in the two cited cases, has followed the consistent prior holdings of the Commission. The Commission has on numerous occasions held that the reasonableness of rates charged, and not strict conformity with the prescribed method of making percentage increases or reductions, is the controlling consideration. *New York Stable Manure Co. vs. Director General*, 93 I.C.C.

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349, citing *Anaconda Copper Mining Co. vs. Director General*, 57 I.C.C. 723, and *Sprague Tire & Rubber Co. vs. Director General*, 80 I.C.C. 285. See also, *American Farm Bureau Federation vs. Aberdeen & R. R. Co.*, 80 I.C.C. 232; *Endicott-Johnson Corp. vs. Erie R. Co.*, 73 I.C.C. 562; *Louisville Fire Brick Works vs. Director General*, 85 I.C.C. 457.

The Commission has also consistently held that when a rate is attacked as unreasonable, the primary question for determination is the reasonableness of the level of the rate charged and not the particular basis on which it was constructed. *Sligo Furnace Co. vs. Chicago & N. W. Ry. Co.*, 74 I.C.C. 463; *Boston Wool Trade Assn. vs. Director General*, 78 I.C.C. 341.

Under the Facts Shown the Commission Cannot Award Reparation.

We do not concede that the carriers acted wrongfully. However, if it be conceded that the carriers acted wrongfully in publishing a full 20 per cent increase on the rates here assailed applying on the movements of peat moss, it does not follow that as a consequence of this wrongful act that these complainants were damaged, or that the amount of their damage is the difference between applying a 6-cent maximum to the rates and the rates which resulted from applying a 20 per cent increase. The complainants here are seeking reparation and they premise their claim on their contention that the carriers did not have authority to publish the in-

Plaintiffs' Exhibit No. 2—(Continued)

creases which were applied. Whether the carriers had the authority to publish the rates is beside the point. Unless it can be said, and on this record no such finding can be made, that as a result of the claimed unlawful act the complainants were required to pay an unreasonable charge in the sense that the charge assessed was more than a fair charge for the service rendered, the complainants were not damaged. If the complainants are not damaged, they are not entitled to reparation.

We concede that under the doctrine as announced by the Supreme Court in *Southern P. Co. vs. Darnell-Taenzer Lumber Co.*, 245 U.S. 531, 62 L.ed. 451, a complainant need not show an actual pecuniary loss in order to show damage when the freight charges are found to be excessive under Section 1, and that the measure of this damage is the amount of the excess exacted by the carriers. But this is not the case made here by these complainants. They have not contended, and Division 2 did not find, that as a result of the claimed unlawful act of the carriers these complainants were required to pay an excessive charge for the service rendered. We cannot agree with Division 2 that, "The evidence introduced by defendants in an attempt to establish the reasonableness of the assailed rates as increased misses the crux of the issue here presented" (Sheet 7), for unless the Commission can find from the evidence introduced that as a result of the action of these defendants, whether authorized or not, the rates which the complainants were required to pay

Plaintiffs' Exhibit No. 2—(Continued)

were excessive, the complainants have failed to prove any damage as a result of the claimed wrongful act, and there is no basis on which this Commission can award the payment of damages.

In passing it should be noted that if, as claimed, the carriers were not authorized to publish the full 20 per cent increase on the rates here assailed in carrying out the order of the Commission in *Ex parte* 162, as correctly pointed out by Division 2, the most that has happened to these complainants is that they were not given an opportunity to protest the rates prior to the effective date; and we again submit that unless these complainants can show that they were damaged thereby, this Commission does not have authority to grant reparation.

We believe that it is fundamental, as pointed out by the Supreme Court in the early case of *Parsons vs. Chicago & N.W.R. Co.*, 167 U.S. 447, 42 L.ed. 231, that—

“The only right of recovery given by the Interstate Commerce Act to the individual is to the ‘person or persons injured thereby, for the full amount of damages sustained in consequence of any of the violations of the provisions of this act.’ So, before any party can recover under the act he must show, not merely the wrong of the carrier, but that that wrong has in fact operated to his injury.”

The quoted language was approved by the Supreme Court in the case of *Pennsylvania R. Co. vs.*

Plaintiffs' Exhibit No. 2—(Continued)
International Coal Min. Co., 230 U.S. 185, 57 L.ed. 1446, and the court in the cited case continued:

"Congress has not then and has not since given any indication of an intent that persons not injured might, nevertheless, recover what, though called damages, would really be a penalty, in addition to the penalty payable to the government."

The Supreme Court in *Louisville & N. R. Co. vs. Sloss-Sheffield S. & I. Co.*, 269 U.S. 217, 70 L.ed. 242, points out that it is not the claimed unjust enrichment of the carriers that gives rise to damages under Section 1; the court said:

"The liability in the case at bar arises out of the wrongful exaction from the shipper, not out of the unlawful receipt or unjust enrichment by the carrier."

In the cited case it was conceded that the charges exacted by the carriers were excessive, and it was contended that since the shippers had been able to pass the charges on to other parties, they were not damaged.

We do not contend that these complainants were able to pass any of the charges on to other parties. It is our contention that the complainants have not shown the charges to be excessive.

In *Davis vs. Portland Seed Company*, 264 U.S. 403, 68 L.ed. 762, the court concludes that when all that the complainants show is that a rate was published in violation of Section 4, such showing does not entitle the complainants to reparation under the Interstate Commerce Act, in the absence of

Plaintiffs' Exhibit No. 2—(Continued)

proof that they were in fact damaged by this action of the carriers. It is clearly indicated by this case that until it is found that the unlawful rate was unreasonable, in the sense that the complaining shippers were required to pay in excess of a fair charge for the service received, they are not entitled to damages under the Interstate Commerce Act.

The Supreme Court has arrived at the same conclusion when this Commission had found that the rates assailed were in violation of Section 1. In *Great Northern R. Co. vs. Sullivan*, 294 U.S. 458, 79 L.ed. 992, the Supreme Court summarized the action of the Commission as follows:

"The commission found the American proportionals to be unjust and unreasonable so far as they exceed specified maxima which it made applicable in lieu of these assailed. It made no finding concerning the reasonableness of the Canadian proportionals or of the combination through rates."

The Court commented on this fact as follows:

"The Great Northern was by the Act required to file tariffs establishing reasonable proportionals to constitute and to be kept in force as factors in the combination through rates applicable to plaintiff's shipments. Its failure to specify just and reasonable charges was a violation of the Act. And, if injured thereby, plaintiff is entitled to recover the damages sustained in consequence of such failure." (Emphasis supplied)

Plaintiffs' Exhibit No. 2—(Continued)

The court concluded:

"But the commission may not order or permit payment of damages by way of reparation without finding that the amount of the charge was unjust and unreasonable."

The court also stated:

"The shipper's only interest is that the charge shall be reasonable as a whole. It follows that retention by the defendant of an undue proportion of just and reasonable charges did not damage plaintiff."

It is clear from the cited case that the court in using the phrases, "unjust and unreasonable," and "reasonable charges," meant that a charge that is unjust and unreasonable or exceeded a reasonable charge is a charge that requires the shippers to pay an excessive rate, or one that is higher than should have been received in light of the value of the services rendered by the carriers and received by the shippers.

The opinions which we have cited of the Supreme Court clearly demonstrate that before this Commission has authority to award reparations under Section 1, it must find that the level of the assailed rate is unreasonable, not that the action of the carriers in publishing the rate was unreasonable. Since it has been clearly demonstrated by this record that the level of the rates here assailed does not exceed what can be fairly charged for the services rendered and received, and since there is no showing that the rates are otherwise unlawful,

Plaintiffs' Exhibit No. 2—(Continued)

the complainants are not entitled to reparations, and the rates condemned from British Columbia origins to Northern California are not shown to be in violation of the Interstate Commerce Act, and the complaint should be dismissed.

The Commission Lacks Jurisdiction to Prescribe Any Future Rates From Origins in Canada to Destinations in Northern California.

The Commission's order with respect to the establishment of rates for the future reads as follows:

"It is further ordered, That the said defendants, according as they participate in the transportation, be, and they are hereby, notified and required to establish on or before July 18, 1950, upon notice to this Commission and to the general public by not less than 30 days' filing and posting in the manner prescribed in section 6 of the Interstate Commerce Act, and thereafter to maintain and apply to the transportation within the United States of ground peat, in carloads, from points in British Columbia, Canada, to points in northern California named in the report made a part hereof, rates which shall not exceed those found just and reasonable in said report." (Emphasis supplied)

The only rates to northern California destinations that were placed in issue in this proceeding are joint, through, single-factor rates from the involved origins in British Columbia, Canada. Neither are any rates from the international border in issue,

Plaintiffs' Exhibit No. 2—(Continued)

nor has the Commission in its report prescribed as just and reasonable any rates from the border. Consequently, the only way defendants could comply with the Commission's order would be to publish joint, through, single-factor rates from the involved origins in British Columbia to the involved destinations in California. Although the Commission may have jurisdiction to award reparation with respect to through international joint rates under certain circumstances, and although the Commission may have power to require carriers to cease and desist from participating in such rates, it cannot require either the establishment or the maintenance of any joint through rates from points in Canada to points in the United States. This is well settled. In *Lewis-Simas-Jones Co. vs. Southern Pacific Company* (1931) 283 U.S. 654, 660, the United States Supreme Court said that the Interstate Commerce Act "does not empower the Commission to prescribe or regulate" joint, through international rates. This principle was applied by the Commission in *Consolidated Stone Cases* (1934) 200 I.C.C. 65, in which complainant assailed joint rates on natural and cast stone from certain origins in the United States to destinations in Canada. The Commission held with respect to these rates (pp. 113-114):

"It would appear that the rates to points in Canada are as much in need of revision as the rates within the United States. However, we do not have jurisdiction to prescribe joint rates for future

Plaintiffs' Exhibit No. 2—(Continued)

application from points in the United States to points in Canada, and the only method open to us of preventing the application to such transportation of joint rates which are found to be unlawful under the act is to require the lines of the United States to discontinue their concurrence therein."

The Commission's unequivocal recognition of this principle is also reflected in its following statements:

"* * * It is well settled that we are without jurisdiction to require the establishment of international joint rates."

Amsden vs. Canadian National Rys. (1931) 176 I.C.C. 259, 260.

"* * * It is well settled that the Commission does not have authority to prescribe rates for the future on traffic from a point in the United States to a point in Canada."

Animal Trap Co. of America vs. New York Cent. R. Co. (1938) 229 I.C.C. 546, 547.

"* * * It is well settled that the Commission does not have authority to prescribe through international rates for the future or to require United States carriers to participate in such rates."

Carstens Packing Co. vs. Great Northern Ry. Co. (1945) 264 I.C.C. 164, 170.

Conclusion

Not only does the order of Division 2 in this proceeding overrule a long line of prior decisions by this Commission, it is in direct conflict with the

Plaintiffs' Exhibit No. 2—(Continued)

recent decisions of Division 3. Because of this we respectfully submit our petition for reopening, reconsideration and oral argument before the entire Commission should be granted, and the Commission should, on further reconsideration, reverse the Order of Division 2 and conclude that under the facts shown of record that these complainants are not damaged, that the Commission does not have authority to award reparations, and that none of the assailed rates are shown to be unlawful.

Respectfully submitted,

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Dated at Seattle, Washington, this 20th day of June, 1950.

Certificate of Service attached.

* * * * *

ORDER

At a General Session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 7th day of January A.D. 1952.

No. 29974—Acme Peat Products, Ltd., et al., vs. Akron, Canton & Youngstown Railroad Company, et al.

Plaintiffs' Exhibit No. 2—(Continued)

No. 30260—Alouette Peat Products, Ltd., vs. The Atchison, Topeka and Santa Fe Railway Company.

Upon consideration of the record in the above-entitled proceedings and of defendants' petition for reconsideration by the entire Commission and for oral argument; and it appearing that the grounds relied upon and set forth in said petition do not constitute good and sufficient cause to warrant granting the request:

It is ordered, That said petition be, and it is hereby, denied.

By the Commission.

[Seal]

W. P. Bartel, Secretary

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ORDER

INTERSTATE COMMERCE COMMISSION

No. 29974

ACME PEAT PRODUCTS, LTD., ET AL.

v.

AKRON, CANTON & YOUNGSTOWN RAILROAD COMPANY ET AL.

No. 30260

ALOUETTE PEAT PRODUCTS, LTD.

v.

ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY

THE MATTER OF AWARDING REPARATION BASED ON RULE-100 STATEMENTS FILED HEREIN

PRESENT: CHARLES D. MAHAFFIE, Commissioner, to whom the above-entitled matter has been assigned for action thereon.

It appearing, That on April 7, 1950, the Commission, division 2, entered its report in the above-entitled proceeding, which report is hereby referred to and made a part hereof, and this proceeding now coming on for further consideration on the question of reparation, and the parties having filed agreed statements with respect to the shipments in question, showing among other things, the dates on which payment of the charges assailed was made; we find that complainants shown in the following table are entitled to awards of reparation from the defendants named below, insofar as the transportation over their lines took place in the United States, in the amounts set opposite their respective names, with interest:

<u>Complainants</u>	<u>Defendants</u> <u>Docket No. 29974</u>	<u>Amounts</u>
Acme Peat Products, Ltd.	BCE-CP-S00-CGW	\$ 30.16
ditto	BCE-CP-S00-CGW-SLSF	65.12
ditto	BCE-CP-S00-CMSTP&P	65.12
ditto	BCE-CP-S00-CMSTP&P-AT&SF	30.16
ditto	BCE-CP-S00-CRI&P	66.40
ditto	BCE-CP-S00-C&NW	32.80
ditto	BCE-CP-S00-CMSTPM&O-MP	36.00
ditto	BCE-CP-S00-GN	33.44
ditto	BCE-CP-S00-GN-CB&O	35.76
ditto	BCE-NP-SP	85.50
ditto	BCE-NP-SP-AT&SF	90.88
ditto	CN-GN-CB&Q	134.72
ditto	CN-GN-SP	409.93
ditto	CN-GN-WP-AT&SF	92.24
ditto	CN-DWP-CMSTP&P	34.16
ditto	CN-DWP-CMSTP&P-AT&SF	31.60
ditto	CN-DWP-CMSTP&P-CRI&P	32.72
ditto	CN-DWP-CMSTP&P-MW	38.30
ditto	CN-DWP-CMSTP&P-SLSF	29.28
ditto	CN-DWP-CSTPM&O	39.04
ditto	CN-DWP-CSTPM&O-AT&SF	32.48

No. 29974 - Sheet 2

<u>Plaintiffs</u>	<u>Defendants</u>	<u>Amounts</u>
Peat		
Products, Ltd.	CN-DWP-CStPM&O-C&NW	62.72
ditto	CN-DWP-CStPM&O-CRI&P	100.16
ditto	CN-DWP-CStPM&O-MP	34.48
ditto	CN-DWP-CStPM&O-MP-SLSF	32.72
ditto	CN-DWP-NP-CB&Q	34.32
ditto	CN-DWP-GN-CMStP&P	31.28
ditto	CN-DWP-GN	32.56
ditto	CN-DWP-GN-CRI&P-MP	32.56
ns &		
row, Ltd.	BCE-CP-B&M-NYNH&H	55.44
ditto	BCE*CP-SOO	176.08
ditto	BCE-CP-SOO-Alton-SOU	162.80
ditto	BCE-CP-SOO-BRC (SOO)	28.32
ditto	BCE-CP-SOO-CB&Q	132.25
ditto	BCE-CP-SOO-CB&Q-B&O	28.88
ditto	BCE-CP-SOO-CGW-AT&SF	65.60
ditto	BCE-CP-SOO-CMStP&P	241.28
ditto	BCE-CP-SOO-CMStP&P-C&NW	28.60
ditto	BCE-CP-SOO-CMStP&P-IC	88.24
ditto	BCE-CP-SOO-CMS&M-EJ&E-B&O	161.57
ditto	BCE-CP-SOO-CNS&M-EJ&E-NYC	81.18
Ditto	BCE-CP-SOO-CMS&M-EJ&E-NYC&StL- W&LE-PWV-WM-Reading	46.56
ditto	BCE-CP-SOO-CNS&M-EJ&E-NYC&StL-W&LE	83.00
ditto	BCE-CP-SOO-CNS&M-EJ&E-NYC&StL- W&LE-PWV-WM-Reading	43.20
ditto	BCE-CP-SOO-CNS&M-EJ&E-PENN	458.53
ditto	BCE-CP-SOO-CNS&M-EJ&E-PENN	43.20
ditto	BCE-CP-SOO-CNS&M-EJ&E-PENN-NYNH&H	43.20
ditto	BCE-CP-SOO-CNS&M-EJ&E-NYC-B&O	48.40
ditto	BCE-CP-SOO-CNS&M-EJ&E-ERIE	84.23
ditto	BCE-CP-SOO-CNS&M-EJ&E-GTW	45.10
ditto	BCE-CP-SOO-CNS&M-EJ&E-IC	44.55
ditto	BCE-CP-SOO-CNS&M-EJ&E-NYC	179.62
ditto	BCE-CP-SOO-CNS&M-EJ&E-PENN-N&W	39.60
ditto	BCE-CP-SOO-CNS&M-EJ&E-PM	41.47
ditto	BCE-CP-SOO-CRI&P	168.44
ditto	BCE-CP-SOO-CStPM&O	58.64
ditto	BCE-CP-SOO-CStPM&O	125.51
ditto	BCE-CP-SOO-CStPM&O-C&NW	234.37
ditto	BCE-CP-SOO-CStPM&O-C&NW-IC	30.64
ditto	BCE-CP-SOO-CStPM&O-MP	68.59
ditto	BCE-CP-SOO-CStPM&O-UP	68.00
ditto	BCE-CP-SOO-CStPM&O-C&NW-WAB	30.83
ditto	BCE-CP-SOO-ERIE	89.21
ditto	BCE-CP-SOO-ERIE-DL&W	48.24
ditto	BCE-CP-SOO-ERIE-LV	46.20
ditto	BCE-CP-SOO-GN-CB&Q	162.21
ditto	BCE-CP-SOO-GB&W-KGB&W-PM	39.93
ditto	BCE-CP-SOO-IC-ACL	45.00
ditto	BCE-CP-SOO-IC-SOU	46.56
ditto	BCE-CP-SOO-MN&S-CGW-AT&SF	32.96
ditto	BCE-CP-SOO-MN&S-CGW-AT&SF-GC&SF	136.97
ditto	BCE-CP-SOO-MN&S-CGW-CB&Q	30.24
ditto	BCE-CP-SOO-MN&S-CGW-IC	86.56

Plaintiffs' Exhibit No. 2--(Continued)

No. 29974 - Sheet - 3

ComplainantsDefendantsAmounts

Atkins & Durbrow, Ltd.	BCE-CP-SOO-MN&S-CGW-KCS	
ditto	BCE-CP-SOO-MN&S-CGW-KCS-L&A	35.20
ditto	BCE-CP-SOO-MN&S-CRI&P-KCS	67.09
	T&NO	
ditto	BCE-CP-SOO-MN&S-CGW-KCS-	29.52
	T&NO-T&M	
ditto	BCE-CP-SOO-MN&S-CGW-MKT-	29.76
	MKT of T	
ditto	BCE-CP-SOO-MN&S-CGW-MP	121.68
ditto	BCE-CP-SOO-MN&S-CGW-MP-	154.48
	KCS-L&A	
ditto	BCE-CP-SOO-MN&S-CGW-MP-SLSF	30.00
ditto	BCE-CP-SOO-MN&S-CGW-SLSF-	80.02
	SLSF of T	
ditto	BCE-CP-SOO-MN&S-CGW-SLSF-	28.00
	SLSF of T-T&NO	
ditto	BCE-CP-SOO-MN&S-CRI&P	67.20
ditto	BCE-CP-SOO-MN&S-CRI&P-BRI	60.00
ditto	BCE-CP-SOO-MN&S-CRI&P-KCS	30.16
	T&NO	
ditto	BCE-CP-SOO-MN&S-CRI&P-NYC&StL	124.36
ditto	BCE-CP-SOO-M&StL	40.59
ditto	BCE-CP-SOO-M&StL-IC	149.44
ditto	BCE-CP-SOO-M&StL-WAB-L&N	101.80
ditto	BCE-CP-SOO-M&StL-WAB-SOU	87.89
ditto	BCE-CP-SOO-NYC	186.80
ditto	BCE-CP-SOO-NYC&StL-C&O	133.61
ditto	BCE-CP-SOO-NP	40.26
ditto	BCE-CP-SOO-Penn.	29.44
ditto	BCE-CP-SOO-Penn-N&W	143.58
ditto	BCE-CP-SOO-Penn-Reading	91.56
ditto	BCE-CP-SOO-PM	48.36
ditto	BCE-CP-SOO-WAB	169.29
	BCE-CPR-TH&B-NYC-DL&W-	92.96
	CRR of NJ-Reading	
ditto	BCE-CPR-TH&B-NYC-ERIE	43.20
ditto	BCE-CPR-TH&B-NYC	419.99
ditto	BCE-CPR-TH&B-NYC-Penn	131.46
ditto	BCE-CPR-TH&B-NYC-Penn-LI	132.00
ditto	BCE-CP-Wabash	46.32
ditto	BCE-NP	39.60
ditto	BCE-NP-CB&Q	29.76
ditto	BCE-NP-CB&Q-AT&SF	33.44
ditto	BCE-NP-CB&Q-CRI&P	32.64
ditto	BCE-NP-SP	36.79
	BCE-NP-SP-AT&SF	359.19
ditto	BCE-NP-SP-NWP	63.20
ditto	BCE-NP-SP-PE	25.44
ditto	BCE-NP-SP-UP	68.64
ditto	GN	33.84
ditto	GN-CB&Q	389.52
ditto	GN-CB&Q-AT&SF	553.25
ditto	GN-CB&Q-AT&SF	214.00
ditto	GN-CB&Q-AT&SF-GC&SF	138.76
ditto	GN-CB&Q-B&O	30.24
ditto	GN-CB&Q-B&O-AC&Y	89.87
ditto	GN-CB&Q-CI&L	41.58
ditto	GN-CB&Q-C&NW	46.46
ditto	GN-CB&Q-C&O	30.48
ditto	GN-CB&Q-CRI&P-UP	83.49
ditto	GN-CB&Q-C&S-AT&SF	39.60
ditto	GN-CB&Q-C&S-FW&DB-AT&SF	30.72
ditto		29.92

<u>Complainants</u>	<u>Defendants</u>	<u>Amounts</u>
s & Durbrow, Ltd.	GN-CB&Q-C&S-F&DC-T&NO	29.92
itto	GN-CB&Q-EJ&E-B&O	39.60
itto	GN-CB&Q-IC-SLSF-SAL	56.10
itto	GN-CB&Q-KCS-L&A	124.19
itto	GN-CB&Q-KCS-SP-TM	27.84
itto	GN-CB&Q-MKT	31.20
itto	GN-CB&Q-MKT-STLB&M	30.72
itto	GN-CB&Q-MP	138.20
itto	GN-CB&Q-MP-C&NW	29.20
itto	GN-CB&Q-NYC	94.13
itto	GN-CB&Q-NYC-NYNH&H	44.52
itto	GN-CB&Q-NYC&StL-WLE-F&WV- WM-Reading	48.48
itto	GN-CB&Q-PRR	128.83
itto	GN-CB&Q-PRR-N&W	49.12
itto	GN-CB&Q-PM	39.05
itto	GN-CB&Q-SL&SF	69.75
itto	GN-CB&Q-UP	135.20
itto	GN-CGW-AT&SF	29.76
itto	GN-CGW-B&O	44.11
itto	GN-CGW-NYC	43.12
itto	GN-CGW-ER IE	174.72
itto	GN-CGW-KCS	63.28
itto	GN-CGW-KCS-IC	62.80
itto	GN-CGW-KCS-T&NO	63.55
itto	GN-CGW-KCS-T&NO-TM	28.80
itto	GN-CGW-KCS-Y&MV-IC	29.04
itto	GN-CGW-NYC	33.20
itto	GN-CGW-PRR	194.67
itto	GN-CGW-PRR-SOU	20.52
itto	GN-CGW-SLSF-MKT	31.44
itto	GN-CGW-SLSF-T&NO	61.84
itto	GN-CMStP&P	274.56
itto	GN-CMStP&P-C&O	45.21
itto	GN-CMStP&P-CNS&M-Alton	28.24
itto	GN-CMStP&P-CNS&M-CI&L	39.71
itto	GN-CMStP&P-CNS&M-EJ&E-B&O	42.24
itto	GN-CMStP&P-CNS&M-EJ&E-C&O	39.71
itto	GN-CMStP&P-CNS&M-EJ&E-NYC&StL- W&LE-PWVA-WM-Reading	44.64
itto	GN-CMStP&P-CNS&M-EJ&E-PRR	130.35
itto	GN-CMStP&P-CNS&M-EJ&E-WAB- DL&W-Reading	44.64
itto	GN-CMStP&P-CNS&M-ERIE	101.55
itto	GN-CMStP&P-EJ&E-NYC	39.93
itto	GN-CMStP&P-EJ&E-PRR	82.06
itto	GN-CMStP&P-IHB-NYC	41.14
itto	GN-CMStP&P-NP	60.56
itto	GN-CMStP&P-NYC	153.19
itto	GN-CMStP&P-PRR	43.20
itto	GN-C&NW	625.25
itto	GN-C&NW-B&O	80.63
itto	GN-C&NW-B&O-Reading	44.52
itto	GN-C&NW-C&O	43.20
itto	GN-C&NW-C&O	61.44
itto	GN-C&NW-C&O	48.00
itto	GN-C&NW	36.08
itto	GN-C&NW-CNS&M-EJ&E-C&O	40.04
itto	GN-C&NW-CNS&M-ERIE	40.48

<u>Complainants</u>	<u>Defendants</u>	<u>Amounts</u>
& Durbrow, Ltd.	GN-C&NW-CNS&M-WAB	40.37
itto	GN-C&NW-EJ&E-B&O	45.32
itto	GN-C&NW-CNS&M-EJ&E-NYC&StL-	
	ERIE	44.28
itto	GN-C&NW-CNS&M-NYC	39.05
itto	GN-C&NW-ERIE	93.19
itto	GN-C&NW-NP	92.08
itto	GN-C&NW-MP-AT&SF	28.96
itto	GN-C&NW-NYC&StL	40.48
itto	GN-C&NW-NYC&StL-WLE-PWVa-	
	WM-Reading	47.28
itto	GN-C&NW-NYC	88.00
itto	GN-C&NW-NYC&StL	39.60
itto	GN-C&NW-PRR	292.96
itto	GN-C&NW-PRR-LI	43.08
itto	GN-C&NW-PRR-N&W	44.28
itto	GN-C&NW-PRR-Reading	45.36
itto	GN-C&NW-PM	92.00
itto	GN-C&NW-UP	87.60
itto	GN-CRI&P	101.64
itto	GN-CRI&P-B&O	48.76
itto	GN-CRI&P-C&S&SB-ERIE-MYN&P	43.80
itto	GN-CRI&P-C&S&SB-PRR-BCE	44.88
itto	GN-CRI&P-SLSF	33.52
itto	GN-CRI&P-WAB-DL&W-Reading	45.72
itto	GN-CstPM&O	29.28
itto	GN-CstPM&O-CB&Q	35.20
itto	GN-CstPM&O-MP	27.76
itto	GN-IC	29.76
itto	GN-M&StL	30.48
itto	GN-M&StL-IC	163.66
itto	GN-M&StL-NYC-SOU	54.65
itto	GN-M&StL-IC-NYC&StL-WLE-	
	PWVa-WM-Reading	44.40
itto	GN-M&StL-WAB-SOU	40.15
itto	GN-M&StL-WAB	28.72
itto	GN-MN&S-CGW-AT&SF	60.56
itto	GN-MN&S-CRI&P	120.24
itto	GN-MN&S-CRI&P-MKT	33.68
itto	GN-MN&S-CRI&P-MKT-T&O	30.80
itto	GN-MN&S-CRI&P-MP-SOU	40.04
itto	GN-MN&S-CRI&P-SLSF	31.76
itto	GN-MN&S-CRI&P-SLSF-WENO	61.92
itto	GN-SOO	29.36
itto	GN-SOO	29.92
itto	GN-SOO-CNS&M-CI&L	41.47
itto	GN-SOO-CNS&M-EJ&E-WAB	30.64
itto	GN-SP	1174.87
itto	GN-SP	323.33
itto	GN-SP-AT&SF	123.26
itto	GN-SP-NWP	126.88
itto	GN-SP-PE	429.20
itto	GN-UP	71.73
itto	GN-WP	308.78
itto	GN-WP-AT&SF	686.73
itto	GN-WP-D&RGW	30.40
itto	GN-WP-SN	26.76
itto	GN-WP-AT&SF-SD&AE	32.76
itto	GN-WP-TS	26.04

<u>Plaintiffs</u>	<u>Defendants</u>	<u>Amounts</u>
Erne Road Peat		
Farms	CN-GN-CB&Q	28.08
ditto	CN-GN-CB&Q-C&S-AT&SF	29.28
ditto	CN-GN-WP-AT&SF	33.35
ditto	CP(V&LI)BCE-NP-CB&Q-AT&SF	32.65
ditto	CP(V&LI)-BCE-NP-SP	295.72
ditto	CP(V&LI)-BCE-NP-SP-AT&SF	300.17
ditto	CP(V&LI)-BCE-NP-SP-PE	30.99
East Peat Co., Ltd.	CN-GN-CB&Q	33.68
ditto	CN-DWP-CMStP&P-CRI&P	112.16
ditto	CN-DWP-CMStP&P-CRI&P-CB&Q	30.80
ditto	CN-DWP-CMStP&P-CB&Q	58.88
ditto	CN-DWP-SOO	63.36
ditto	CN-DWP-CMStP&P-M&StL	87.84
ditto	CN-DWP-NP	60.24
ditto	CN-DWP-CMStP&P-NYC&StL	43.45
ditto	CN-DWP-CMStP&P-MW	86.90
ditto	CN-DWP-NP-CMStP&P	29.84
ditto	CN-DWP-CMStP&P-SLSF	27.20
ditto	CN-DWP-CMStP&P-CNS&M	34.64
ditto	CN-DWP-CMStP&P	204.72
ditto	CN-DWP-CMStP&P-CGW	148.80
ditto	CN-DWP-CStPM&O	61.28
ditto	CN-DWP-CMStP&P-IC	89.76
ditto	CN-DWP-GN	90.56
ditto	CN-DWP-CStPM&O-C&NW	122.64
ditto	CN-GN-SP	1012.82
ditto	CN-GN-SP	756.75
ditto	CN-GN-SP	547.71
ditto	CN-GN-SP	150.56
ditto	CN-GN-SP-UP	32.08
ditto	CN-GN-SP-NWP	375.53
ditto	CN-GN-SP-NWP	115.36
ditto	CN-GN-WP	332.30
ditto	CN-GN-WP-SN	392.09
ditto	CN-GN-WP-SN	84.62
ditto	CN-GN-WP-AT&SF	251.70
ditto	CN-GN-WP	23.10
ditto	CN-GN-WP-D&RGW	72.49
ditto	CN-GN-UP-D&RGW	40.37
ditto	CN-GN-UP	204.24
ditto	CN-GN-UP	17.10
ditto	CP-NP-SP	681.58
ditto	CP-NP-SP	654.57
ditto	CP-NP-SP	611.72
ditto	CP-NP-SP	621.61
ditto	CP-NP-SP	502.63
ditto	CP-NP-SP	231.81
ditto	CP-NP-SP-NWP	163.57
ditto	CP-NP-SP-AT&SF	60.82
ditto	CP-NP-SP	31.43
ditto	CP-NP-SP-SN	162.57
ditto	CP-NP-SP-WP	85.25
ditto	CP-NP	205.16
ditto	CP-NP-SP-SN	24.23
ditto	CP-NP-SP-WP	23.98
ditto	GN-SP	22.19
ditto	GN-WP-AT&SF	23.79

<u>Plaintiffs</u>	<u>Defendants</u>	<u>Amounts</u>
or Peat Co., Ltd.	CN-DWP-CMStP&P	84.88
tto	CN-DWP-CMStP&P-M&StL-WAB	29.76
tto	CN-DWP-CMStP&P-MKT	28.32
tto	CN-DWP-CMStP&P-MP	114.80
tto	CN-DWP-CStPM&O-CB&Q	207.08
tto	CN-DWP-CStPM&O-CGW	58.88
tto	CN-DWP-CStPM&O-CNW-CRI&P	120.00
tto	CN-DWP-CStPM&O-CRI&P-UP	57.84
tto	CN-DWP-CStPM&O-M&StL	60.80
tto	CN-DWP-CStPM&O-M&StL-WAB	27.20
tto	CN-DWP-CStPM&O-MP	28.08
tto	CN-GN-CB&Q	29.76
tto	CN-GN-SP	55.80
tto	CN-GN-SP-NWP	27.72
tto	CN-GN-UP-CPR	11.75
tto	CN-GN-WP	43.25
tto	CN-GN-WP-AT&SF	61.29
tto	CP (V&LI) -BCE-NP-SP-PE	31.41
land Peat Co., Ltd.	CN-DWP-CMStP&P	122.92
tto	CN-DWP-CMStP&P-MP	28.08
tto	CN-DWP-CMStP&P-UP	27.20
tto	CN-DWP-CStPM&O-C&NW	58.00
tto	CN-DWP-CStPM&O-C&NW-CRI&P	29.92
tto	CN-DWP-GN	31.95
tto	CN-DWP-NP-CGW-AT&SF	29.04
tto	CN-GN-CB&Q-UP	29.92
tto	CN-GN-UP	29.92
tto	CN-GN-WP	20.76
tto	CN-GN-WP-AT&SF	24.88
tto	CP (V&LI) -BCE-NP-SP	48.78
n Peat Moss Co.,		
d.	CN-GN	23.16
tto	CN-GN-CB&Q-AT&SF	29.44
tto	CN-GN-CB&Q-UP	30.48
tto	CN-GN-NP	4.02
tto	CN-GN-NP-CAMP	12.42
tto	CN-GN-SP	299.49
tto	CN-GN-UP	30.56
tto	CN-DWP-CMStP&P	35.37
tto	CN-DWP-CMStP&P-MP-L&N-ACL	43.32
tto	CN-DWP-CMStP&P-C&NW	27.36
itto	CN-DWP-CStPM&O-C&NW-CB&Q	27.20
itto	CN-DWP-NP-M&StL-IC	27.20
itto	CN-DWI-GN	29.60
itto	CP (V&LI)-BCE-NP-SP	27.00

<u>Complainants</u>	<u>Defendants</u>	<u>Amounts</u>
Pacific Peat Products		
Ltd.	CN-GN-CB&Q	118.00
ditto	CN-GN-NP	3.73
ditto	CN-GN-SP	274.76
ditto	CN-GN-NP-SP	15.44
ditto	CN-GN-UP	68.40
ditto	CN-GN-WP	21.00
ditto	CN-GN-WP-AT&SF	439.97
ditto	CN-GN-WP-SN	70.56
ditto	CN-DWP-CMStP&P	60.07
ditto	CN-DWP-CMStP&P-AT&SF	93.12
ditto	CN-DWP-CMStP&P-MKT	28.56
ditto	CN-DWP-CMStP&P-MP	120.08
ditto	CN-DWP-CMStP&P-SLSF	28.08
ditto	CN-DWP-CstPM&O	30.97
ditto	CN-DWP-CstPM&O-CB&Q	27.92
ditto	CN-DWP-CstPM&O-C&NW	30.53
ditto	CN-DWP-CstPM&O-CRI&P	220.24
ditto	CN-DWP-CstPM&O-M&StL	31.51
ditto	CN-DWP-GN-CB&Q	65.04
ditto	CN-DWP-GN-CB&Q-AT&SF	60.96
ditto	CN-DWP-GN-CB&Q-SLSF	63.76
ditto	CN-DWP-GN-CGW-MP	31.12
ditto	CN-DWP-GN-CRI&P	91.36
ditto	CN-DWP-GN-CB&Q	30.40
ditto	CN-DWP-NP-CGW	93.76
ditto	CN-DWP-NP-CMStP&P	89.84
ditto	CN-DWP-NP-CMStP&P-CGW	30.72
ditto	CN-DWP-NP-CRI&P	32.00
ditto	CN-DWP-NP-M&StL	60.72
Richmond Peat Products		
Ltd.	CN-DWP-CMStP&P	46.24
ditto	CN-DWP-CMStP&P-MP	37.68
ditto	CN-DWP-CstPM&O-C&NW	41.52
ditto	CN-DWP-CstPM&O-CRI&P	80.08
ditto	CN-GN-NP	7.30
ditto	CN-GN-SP&S-OT	16.41
ditto	CN-GN-SP	121.36
ditto	CN-GN-WP-AT&SF	34.00
Hafer-Haggart, Ltd.	CN-DWP-CMStP&P	170.24
ditto	CN-DWP-CMStP&P-AT&SF	28.48
ditto	CN-DWP-CMStP&P-AT&SF-T&NO	27.52
ditto	CN-DWP-CstPM&O-CB&Q	59.12
ditto	CN-DWP-CstPM&O-C&NW-MP	29.44
ditto	CN-DWP-CstPM&O-CRI&P	87.44
ditto	CN-DWP-CstPM&O-MP	27.52
ditto	CN-DWP-CstPM&O-UP	27.92
ditto	CN-GN-WP-AT&SF	31.92

<u>Complainants</u>	<u>Defendants</u>	<u>Amounts</u>
Western Peat Co., Ltd.	CN-DWP-CMStP&P	30.00
ditto	CN-DWP-CMStP&P-AT&SF	29.76
ditto	CN-DWP-CMStP&P-CRI&P-SP-T&P	36.40
ditto	CN-DWP-CMStP&P-M&StL	57.56
ditto	CN-DWP-CMStP&P-PM	40.48
ditto	CN-DWP-CMStP&P-SLSF	58.00
ditto	CN-DWP-C&NW-CB&Q	28.48
ditto	CN-DWP-C&NW-M&StL	28.40
ditto	CN-DWP-CStPM&O	28.88
ditto	CN-DWP-CStPM&O-CGW-T&NO	30.16
ditto	CN-DWP-CStPM&O-C&NW	268.55
ditto	CN-DWP-CStPM&O-C&NW-CRI&P	28.40
ditto	CN-DWP-CStPM&O-CRI&P-AT&SF	28.88
ditto	CN-DWP-CStPM&O-MP	28.48
ditto	CN-DWP-GN	30.08
ditto	CN-DWP-GN-CB&Q	57.92
ditto	CN-DWP-GN-CB&Q-MKT	28.56
ditto	CN-DWP-GN-CGW	30.40
ditto	CN-DWP-GN-MN&S-CRI&P	113.12
ditto	CN-DWP-GN-MN&S-CRI&P-MP	27.68
ditto	CN-DWP-GN-M&StL	28.24
ditto	CN-DWP-GN-SOO	29.68
ditto	CN-DWP-MN&S-CRI&P	30.64
ditto	CN-DWP-NP	27.52
ditto	CN-DWP-NP-CRI&P-SL&SW-F&DC	31.15
ditto	CN-DWP-SOO	30.08
ditto	CN-DWP-SOO-CB&Q	27.20
ditto	CN-GN	39.79
ditto	CN-GN-CB&Q	30.17
ditto	CN-GN-NP	27.29
ditto	CN-GN-SP	520.24
ditto	CN-GN-SP	1060.26
ditto	CN-GN-SP	629.86
ditto	CN-GN-SP-AT&SF	414.77
ditto	CN-GN-SP-NWP	452.22
ditto	CN-GN-SP-NWP-P&SR	52.58
ditto	CN-GN-SP-PF	95.16
ditto	CN-GN-SP-UP	93.25
ditto	CN-GN-UP	216.64
ditto	CN-GN-UP-MP	32.88
ditto	CN-GN-WP	70.89
ditto	CN-GN-WP-AT&SF	179.62
ditto	GN	203.05
ditto	GN-CB&Q	97.83
ditto	GN-CB&Q-CRI&P	34.56
ditto	GN-CMStL&P	130.16
ditto	GN-C&NW-CRI&P	29.28
ditto	GN-C&NW-MP	29.76
ditto	GN-CRI&P	35.92
ditto	GN-CRI&P-AT&SF	33.84
ditto	GN-M&StL	32.56
ditto	GN-NP	4.13
ditto	GN-SP	803.29

<u>Complainants</u>	<u>Defendants</u>	<u>Amounts</u>
Western Peat Co., Ltd.	GN-SP-AT&SF	
ditto	GN-SP-NWP	222.84
ditto	GN-SP-IE	329.08
ditto	GN-SP-UP	196.26
ditto	GN-UP	64.97
ditto	GN-WP	108.67
		84.64

<u>Complainants</u>	<u>Defendants</u>	<u>Amounts</u>
Louette Peat Products, Ltd.	CP-S00-CB&Q	64.91
ditto	CP-S00-CGW-UP	34.80
ditto	CP-S00-CI&L	49.48
ditto	CP-S00-CMStP&P	178.71
ditto	CP-S00-CMStP&P-GB&W	27.67
ditto	CP-S00-C&NW	88.67
ditto	CP-S00-CStPM&O-CB&Q	121.08
ditto	CP-S00-CStPM&O-C&NW	91.11
ditto	CP-S00-CStPM&O-GN	30.61
ditto	CP-S00-CStPM&O-MP	63.09
ditto	CP-S00-ERIE	37.60
ditto	CP-S00-GN-CB&Q	31.12
ditto	CP-S00-IC-NC&StL	85.36
ditto	CP-S00-MN&S-CGW	30.31
ditto	CP-S00-MN&S-CGW-MKT	31.69
ditto	CP-S00-MN&S-CRI&P	121.10
ditto	CP-S00-MN&S-CRI&P-CI&L	46.49
ditto	CP-S00-MN&S-CRI&P-KCS-SSW-SP	37.53
ditto	CP-S00-MN&S-CRI&P-SLSF	27.20
ditto	CP-S00-M&StL	30.88
ditto	CP-S00-MidC-CMStP&P-M&StL	29.01
ditto	CP-S00-NYC	45.71
ditto	CP-S00-PRR	47.76
ditto	CN-NP	26.43
ditto	CP-NP-CB&Q	34.27
ditto	CP-NP-SP	850.30
ditto	CP-NP-SP-AT&SF	31.51
ditto	CP-NP-SP-N/P	57.54
ditto	CP-NP-SP-SN	106.22
ditto	CP-NP-SP-PE	60.37
ditto	CP-NP-SP-WP	57.03
ditto	CP-NP-UP	63.84
ditto	CP-TH&B-MC(NYC)-PRR-SOU	43.32

Docket No. 30260

Louette Peat Products, Ltd.	CP-S00-CB&Q	85.42
ditto	CP-S00-CGW-AT&SF	35.96
ditto	CP-S00-CStPM&O	35.29
ditto	CP-S00-CStPM&O-CB&Q	70.17
ditto	CP-S00-CStPM&O-C&NW	250.59
ditto	CP-S00-CStPM&O-MP	44.56
ditto	CP-S00-CStPM&O-MP-UP	70.88
ditto	CP-S00-CStPM&O-UP	76.84
ditto	CP-S00-GN-CB&Q	72.51
ditto	CP-S00-MN&S-CGW	34.11
ditto	CP-S00-MN&S-CGW-C&NW	34.75
ditto	CP-S00-MN&S-CGW-UP	71.90
ditto	CP-S00-MN&S-CRI&P	35.76
ditto	CP-S00-MN&S-CRI&P-MP	35.34

<u>Complainants</u>	<u>Defendants</u>	<u>Amounts</u>
Louette Peat		
Products, Ltd.	CP-NP	27.43
ditto	CP-NP-CB&Q-ST&SF	35.67
ditto	CP-NP-SP	1862.54
ditto	CP-NP-SP-AT&SF	121.25
ditto	CP-NP-SP-AT&SF-M&ET	35.49
ditto	CP-NP-SP-NWP	29.96
ditto	CP-NP-SP-NWP-P&SR	25.88
ditto	CN-NP-SP-PE	118.41

It is therefore ordered, That the defendants, named in each of the groups shown in the above table, be, and they be hereby, authorized and directed to pay unto the complainants shown opposite said groups, on or before February 19, 1954, the amounts set opposite their respective names in said table, with interest thereon at the rate of 4 percent per annum, from the respective dates of payment of the charges assailed shown in the aforesaid agreed statements, as reparation on account of unreasonable rates charged and collected on numerous carload shipments of ground peat, shipped from points in British Columbia, Canada, and points in the United States, insofar as the transportation took place in the United States.

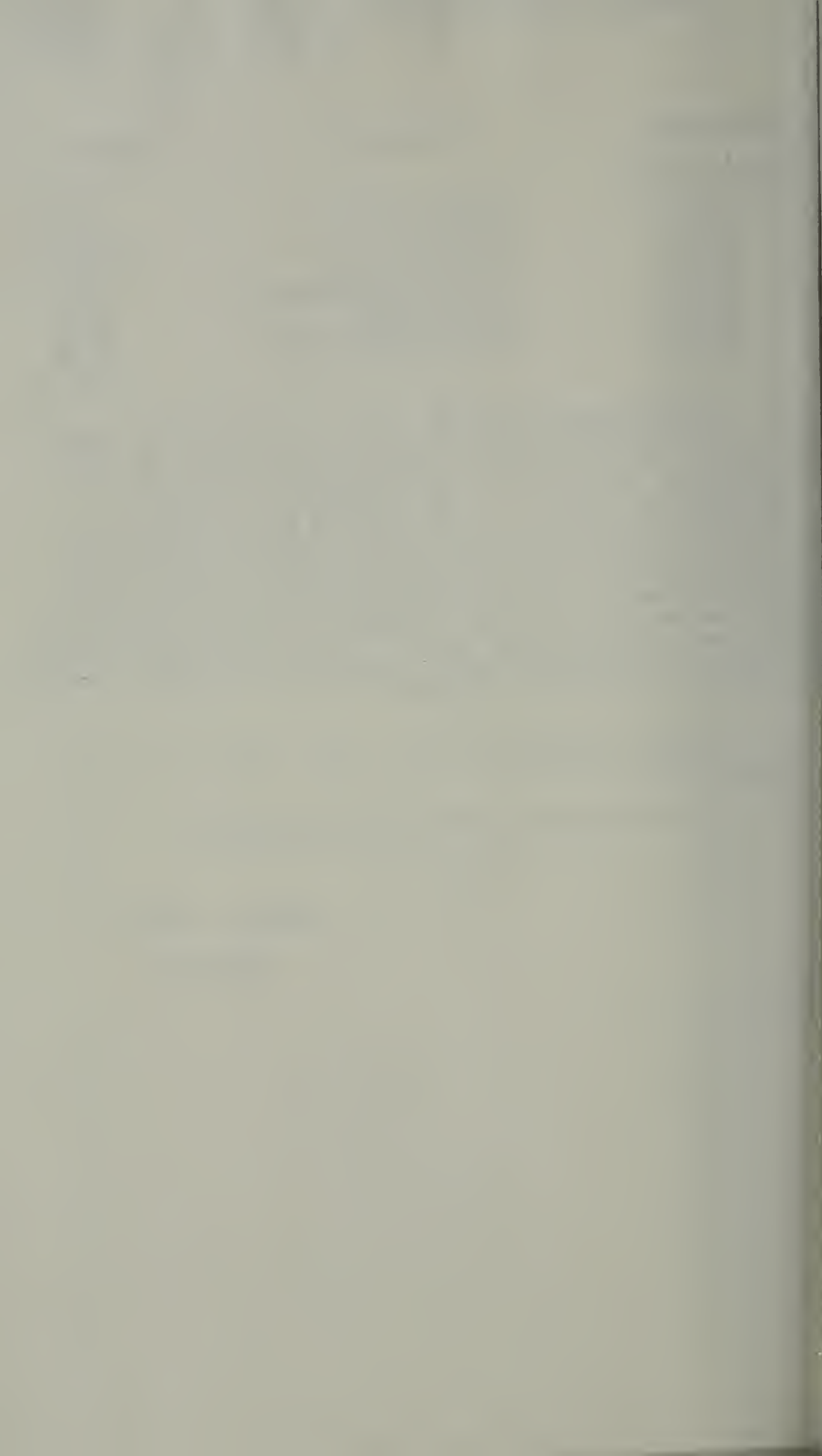
Dated at Washington, D. C., this 30th day of December, 1953.

By the Commission, Commissioner Mahaffie.

GEORGE W. LAIRD,

Secretary.

EAL)



Plaintiffs' Exhibit No. 2—(Continued)

Filed 6/21/54

Before the Interstate Commerce Commission

No. 29974—Acme Peat Products, Ltd., et al., Complainants, vs. The Akron, Canton and Youngstown Railway Company, et al., Defendants.

PETITION FOR LEAVE TO FILE PETITION
TO REOPEN AND RECONSIDER

Come Now the defendants, and petition the Commission for leave to file a petition to reopen this proceeding for reconsideration of the decision of Division 2 in this cause, dated April 7, 1950, and to vacate the order of December 30, 1953 requiring the payment of reparations.

For the reasons stated in our petition for reconsideration of the report and order of Division 2 filed in this cause, dated June 23, 1950, these defendants were and are of the opinion that in awarding reparations, the Commission exceeded its authority.

After our petition for reconsideration was denied by the Commission, while we concluded not to review the order, we did conclude not to voluntarily comply with the order requiring the payment of reparations, and to test the validity of the order and when suit was instituted to enforce the award of reparations. Consequently, no reparations have been paid, and suit has not yet been instituted to enforce the reparation order entered in this cause, dated December 30, 1953.

Plaintiffs' Exhibit No. 2—(Continued)

After taking this position, we noted that the identical principle adopted by the Division in this proceeding was involved in the case of *F. W. Bolgiano & Co. vs. Baltimore & Ohio Ry. Co., et al.*, 289 I.C.C. 169, in which Division 2 awarded reparations, citing and relying on the decision of the Division in this case.

We now have a copy of the decision of Division 2 on reconsideration in the *Bolgiano* case, dated February 11, 1954, reversing the earlier findings and rejecting the principle previously adopted therein and in this case, and dismissing the complaint.

This change in circumstances has prompted our filing this petition for leave to file petition to reopen for reconsideration the decision in this case.

Wherefore, your petitioners pray for leave to file a petition to reopen this case for reconsideration.

Respectfully submitted,

Charles W. Burkett

Harold G. Boggs

L. W. Hobbs

B. E. Lutterman

R. Paul Tjossem

Attorneys for Defendants

Dated at Seattle, Washington, this 2nd day of March, 1954.

Certificate of Service attached.

Plaintiffs' Exhibit No. 2—(Continued)

Filed 6/21/54

Before the Interstate Commerce Commission

No. 29974—Acme Peat Products, Ltd., et al., Complainants, vs. The Akron, Canton and Youngstown Railway Company, et al., Defendants.

PETITION TO REOPEN FOR RECONSIDERATION

Come Now the defendants, and petition the Commission to reopen this cause, and to reconsider and reverse the decision entered herein by Division 2, dated April 7, 1950, and to vacate the order of December 30, 1953 requiring the payment of reparations by these defendants.

Statement of the Case

In deciding this case, Division 2, so far as we can determine, for the first time applied the doctrine of "unjust enrichment" as a basis for awarding reparation, and granted reparations even though it was not shown that the complainants had suffered any damage. Commissioner Elliott in his dissent in the subsequent case of F. W. Bolgiano & Co. vs. Baltimore & Ohio Ry. Co., et al., 289 I.C.C. 169, states he was unable to find any other similar decision; nor have we by our research found any similar decision.

The above mentioned Bolgiano case involved the same issue presented in this proceeding, and the Division in its first decision, dated June 25, 1953,

Plaintiffs' Exhibit No. 2—(Continued)

followed and affirmed the decision herein. The Division on reconsideration in the *Bolgiano* case has now reversed its first decision and rejected the doctrine first announced in this proceeding. This action leaves only this case in which this erroneous doctrine has been applied.

As stated in our petition for leave to file this petition, the defendants have not paid any reparations as required by the order dated December 30, 1953. Consequently the decision in this case has not become moot.

The decision in this case is erroneous, and this proceeding should be reopened and the decision should be reconsidered and reversed.

Argument

The error committed by the Division has been pointed out by us in our petition for reconsideration, by Commissioner Elliott in his dissent to the first decision in the *Bolgiano* case, by the defendants in the *Bolgiano* case in their petition to reopen and reconsider that decision, and now by the majority of Division 2 in their decision on reconsideration in the latter case. The error is apparent and little can be added to the arguments and reasoning already presented.

However, we might add this:

From the first, the power of the Commission to award reparations has been limited to making such awards in satisfaction of damages sustained by complainants. Following the grant of this power, it

Plaintiffs' Exhibit No. 2—(Continued)

has never been enlarged upon, and the limits of that power as defined by the Supreme Court in *Davis vs. Portland Seed Co.*, 264 U.S. 403, 68 L.ed. 762, hold true today.

In that case, the court considered rates filed in contravention of the 4th section of the Act, and held that the mere showing of this fact did not authorize reparations to the basis of the lower rate. The court pointed out (page 765):

“Relying on *Pennsylvania R. Co. vs. International Coal Min. Co.*, 230 U.S. 184, 57 L.ed. 1446, 33 Sup. Ct. Rep. 893, Ann. Cas. 1915A, 315, the Interstate Commerce Commission has definitely rejected respondent's theory by many opinions, and holds that while a charge prohibited by the long and short haul clause (§4) may subject the carrier to prosecution by the government, it does not afford adequate basis for reparation where there is no other proof of pecuniary damage. *John Nix & Co. vs. Southern R. Co.* (1914) 31 Inters. Com. Rep. 145; *S. J. Greenbaum Co. vs. Southern R. Co.*, 38 Inters. Com. Rep. 715; *Chattanooga Implement & Mfg. Co. vs. Louisville & N. R. Co.*, 40 Inters. Com. Rep. 146; *LaCrosse Shippers' Asso. vs. Chicago, I. & L. R. Co.*, 43 Inters. Com. Rep. 520; *Oregon Fruit Co. vs. Southern P. Co.*, 50 Inters. Com. Rep. 719; *Iten Biscuit Co. vs. Chicago, B. & Q. R. Co.*, 53 Inters. Com. Rep. 729; *Illinois Brick Co. vs. Director Gen.* (1920) 57 Inters. Com. Rep. 320, 323.”

The court cited with approval the following

Plaintiffs' Exhibit No. 2—(Continued)

language found in *Parsons vs. Chicago & N. W. R. Co.*, 167 U.S. 447, 42 L.ed. 231,

“ ‘Before any party can recover under the act, he must show not merely the wrong of the carrier, but that that wrong has in fact operated to his injury.’ Congress had not then and has not since given any indication of an intent that persons not injured might, nevertheless, recover what, though called damages, would really be a penalty, in addition to the penalty payable to the government.”

The foregoing statement is the law today and applies to rates claimed to have been filed in violation of Section 6, as well as to rates filed in violation of Section 4.

Since a majority of Division 2 have now recognized the error in the decision in this case, it may be unnecessary to consider the dissent of Commissioner Alldredge to the second decision in the *Bolgiano* case. However, since this petition may be reviewed by the entire Commission, we do wish to comment on one issue raised in this dissent: Commissioner Alldredge in his dissent cites *Southern Pac. Co. et al. vs. Darnell-Taenzer Co. et al.*, 245 U.S. 520, 534, 62 L.ed. 455, and *I.C.C. vs. U. S.*, 289 U.S. 385, 390, 77 L.ed. 1273, as supporting the rule that if the increases in the rates charged were not authorized, shippers are entitled to reparations to the extent of the unauthorized increases. These cases do not support this contention. It is evident from these cases that the “illegal profit” referred to in the quotation cited by Commissioner All-

Plaintiffs' Exhibit No. 2—(Continued)

dredge is a profit in excess of a reasonable charge.

In *Southern Pac. Co. vs. Darnell-Taenzer Co. et al.*, *supra*, the court denied the contention that a shipper who has paid an excessive rate could recover only if he was unable to pass this charge on to another party. The holding in this case is made completely clear by Judge Cardozo in the second cited case, *I.C.C. vs. U. S.*, *supra*, at page 390:

"When the rate exacted of a shipper is excessive or unreasonable in and of itself, irrespective of the rate exacted of competitors, there may be recovery of the overcharge without other evidence of loss. The carrier ought not to be allowed to retain his illegal profit and the only one who can take it from him is the one that alone was in relation with him, and from whom the carrier took the sum.' *Southern P. Co. vs. Darnell-Taenzer Lumber Co.*, *supra*."

The court in the last cited case affirms the rule that reparations can be allowed by this Commission only when the complainants are shown to have been damaged by some act of the defendants.

Division 2 in awarding reparations did not find that the assailed rates were excessive. Nor could they. The sole basis (and the only basis on this record, for that matter) for condemning these rates was the finding that the carriers applied unauthorized increases. The evidence bearing on the reasonableness or unreasonableness of the assailed rates is accurately summarized by Examiners Hall and Fishman in their proposed report when they stated,

Plaintiffs' Exhibit No. 2—(Continued)

"Other than showing that the rates assailed were increased by greater amounts than the rates on fertilizers, complainants offered no substantial evidence in support of their allegation of unreasonableness. * * * There is nothing of record in the instant case to indicate that the basic rates on peat, established to meet competitive conditions, were maximum reasonable rates. On the contrary, the evidence discloses that to California destinations, for example, that if the original rates established in 1937 and increased in 1938 had been subject to no voluntary reductions and had been increased by all general increases authorized by the Commission, they would have been substantially higher than the rates assailed."

The assailed rates are shown to be depressed rates made to meet marketing competition, and fall well below reasonable maximum levels. The only evidence offered by complainants bearing on the issue of the reasonableness of the charges was their Exhibit 1, Subparagraphs 8 and 9, page 2. Here it is shown that the basic rates (the rates in effect prior to any increase) will return only 12 and a fraction cents per car mile, and this is compared with the then permitted 4th section minimum earnings of 10 cents per car mile. Consequently, if the basic rates are increased 20 per cent (the basis of the assailed rates), the car mile earnings become 14.4 cents. The Examiners were correct in their statement that the complainants offered no substantial evidence that the rates were unreasonable.

Plaintiffs' Exhibit No. 2—(Continued)

Conclusion

The complainants have not been damaged. The decision of Division 2 should be reversed, the order awarding reparations vacated, and the complaint dismissed.

Respectfully submitted,

Charles W. Burkett

Harold G. Boggs

L. W. Hobbs

B. E. Lutterman

R. Paul Tjossem

Attorneys for Defendants

Dated at Seattle, Wash., this 2nd day of March, 1954.

Certificate of Service attached.

* * * *

Filed 7/6/54

ORDER

At a General Session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 21st day of June, A.D. 1954.

No. 29974—Acme Peat Products, Ltd., et al., vs. Akron, Canton & Youngstown Railway Company, et al.

No. 30260—Alouette Peat Products, Ltd., vs. Atchison, Topeka & Santa Fe Railway Company.

Upon consideration of the record in the above-

Plaintiffs' Exhibit No. 2—(Continued)

applicable, and not shown to have been unjust, unreasonable, or otherwise unlawful. Findings in prior report, 277 I.C.C. 641, reversed in part, and complaint dismissed.

Appearances as shown in prior report.

REPORT OF THE COMMISSION ON RECONSIDERATION

By the Commission:

In the prior report herein, 277 I.C.C. 641, division 2 found that the assailed rates² on ground peat, shipped in carloads from points in British Columbia, Canada, to points in the United States were applicable, but unjust and unreasonable to the extent that the resulting charges for transportation within the United States were higher than the levels in effect prior to our decision in *Ex Parte* No. 162, *Increased Railway Rates, Fares, and Charges*, 1946, 266 I.C.C. 537, 623, plus an increase, authorized in that proceeding, of 20 percent, subject to a maximum of 6 cents per 100 pounds, or \$1.20 per net ton. Upon petition by the defendants, the proceeding was reopened for reconsideration on the record as made. The pertinent facts are herein restated only insofar as appears necessary.

Rates in tariffs which included ground peat in the description of fertilizers and which were increased 20 percent, subject to a maximum of 6 cents per 100 pounds, or \$1.20 per ton, as specific-

² Rates are herein stated per 100 pounds.

Plaintiffs' Exhibit No. 2—(Continued)

ally authorized for a group of fertilizers which included peat, are not assailed. The assailed rates are those which were published as commodity rates on ground peat, and were increased 20 percent but not subject to a maximum per 100 pounds, for which the authority stated was the decision in Ex Parte No. 162. As stated by the division in the prior report the complainant's contention that the assailed rates were not applicable has no merit since a rate published in a tariff on file with the Commission does not become inapplicable by reason of the fact that it contravenes an order of the Commission or was published on short notice without authority. An award of reparation in such circumstances has no justification except upon a showing that damages, as measured by sound standards, were sustained.

The only issue presented for determination is whether the published transportation charges paid by the complainants exceeded maximum reasonable charges. This is the only standard of justness by which compensatory damages can properly be measured for an award of reparation upon the facts presented. For the reasons stated in the prior report, there is no showing of undue prejudice. In a similar proceeding concerning increases in rates on humus, *F. W. Bolgiana & Co., Inc., vs. Baltimore & O. R. Co.*, 289 I.C.C. 169, 291 I.C.C. 659, by division 2, in which we denied a petition of complainants for reconsideration, it is stated in the second report, at pages 660 and 661:

Plaintiffs' Exhibit No. 2—(Continued)

The evidence introduced by the complainants, and their contentions founded thereon, as to the unreasonableness of the rates on humus in bulk, consists solely of the fact that the 25-percent increase in the column 17.5 rates was published, under color of authorization in Ex Parte No. 162, in tariffs which became effective on short notice. The authorization in Ex Parte No. 162 having been limited to an increase of 20 percent, subject to a maximum of 6 cents per 100 pounds, it is obvious that the defendants acted without authority from this Commission. However, since we have no authority to award punitive or exemplary damages, the publication of the 25-percent increase in violation of the Commission's tariff rules as to notice does not afford a sufficient basis for a finding of unreasonableness or an award of reparation. In other words, the defendants are subject to censure for improper tariff publication, but that fact alone is inadequate support for an award of damages against them.

Here, as in the proceeding just cited, the defendants are subject to censure for improper tariff publication but that situation alone does not afford an adequate basis for a finding of unreasonableness or an award of reparation, since we have no authority to award punitive or exemplary damages. We shall now consider the evidence of record relating to the reasonableness of the assailed charges.

Peat, also called peat moss, is available in Canada in the provinces of British Columbia, Ontario,

Plaintiffs' Exhibit No. 2—(Continued)

Nova Scotia, and New Brunswick, in the United States in Maine, and has been imported from Germany and Sweden. The shipments here under consideration came from British Columbia. Peat is there obtained from peat bogs in delta land near the Fraser River, is dried in the sun, or by the use of hydraulic machinery, is ground either coarse or fine, then packed in bales averaging around 115 pounds and having a density of about 11.5 pounds per cubic foot. Six commercial fertilizers named by defendants range from 57.4 to 86 pounds per cubic foot. The selling price of peat, f.o.b. origin or destination, depending in part on competitive conditions, is around \$1.75 to \$1.85 per bale. It is shipped in closed freight cars.

The coarse variety is used as poultry litter, and the finely ground for horticultural purposes. About three-fourths of the ground peat shipped by complainants to destinations in the United States is the horticultural variety. When mixed with the soil, ground peat adds little or nothing to its fertility. The initial effect of such mixing is to condition the soil by making it pliable and mellow. In addition peat holds water like a sponge, helps the soil to retain moisture, and is sold to residents of cities and towns for use in the establishment of lawns as well as to individuals engaged in agriculture. The coarse variety, sold as poultry litter, competes in California with ground bark, straw, wood shavings, and sawdust, and in the middle west with some of all of these items and in addition it there com-

Plaintiffs' Exhibit No. 2—(Continued)

petes with processed sugar cane, oat hulls, and porous lava rock.

During the period when the shipments under consideration were made, more than 1,500 carloads of ground peat, destined to points in the United States, were shipped over various routes from origins in British Columbia, including a substantial number from New Westminster, B. C., situated near the west coast, 141 miles northward via rail from Seattle, Wash., and about 20 miles north of the Canadian boundary. They were consigned to numerous points in 40 designated States, of which 21 are west of the Mississippi River. Shipments to California approximated 768 carloads, Iowa 105, Illinois 67, Kansas 62, Nebraska 60, Texas 57, Missouri 53, Minnesota 41, and from 1 to 35 carloads to points in 32 other States.

In 1929 one of the complainants herein requested certain rail carriers to provide carload rates for the transportation of peat from origins in British Columbia to indicated western points in the United States, and the carriers subsequently published, at designated periods during the years, 1930 to 1937, rates from New Westminster ranging from 14 to 20 cents to Seattle, Wash., 14 to 17 cents to Tacoma, Wash., and from 24 to 33 cents to Portland, Oreg., minimum weights 24,000 to 40,000 pounds. Effective March 6, 1937, all-rail joint commodity rates on peat of 80 cents to points in California on San Francisco Bay and 100 cents to points in southern California, including Los Angeles, mini-

Plaintiffs' Exhibit No. 2—(Continued)

num 24,000 pounds, were established in an effort to meet the competition of imports which in 1936 had aggregated 4,455 tons. From Sweden and Germany, respectively, peat was delivered on the docks at San Francisco at transportation costs, including toll and handling charges, of 43.6 and 38.1 cents per 100 pounds.

The joint rates from New Westminster to San Francisco and Los Angeles, minimum weight 24,000 pounds, were increased from 80 to 100 cents, respectively, to 88 and 110 cents, on March 28, 1938, as authorized in Ex Parte 123, Fifteen Percent Case, 1937-1938, 226 I.C.C. 41. Thereafter on June 30, 1939, the defendants established a reduced rail rate of 58 cents from New Westminster to designated points in central California, including San Francisco, and 73 cents to Los Angeles, minimum weight 30,000 pounds, to enable the California distributors not having foreign connections, to participate in the marketing of this product, and on August 6, 1940, a rate of 72 cents, minimum weight 36,000 pounds became effective from New Westminster to Los Angeles, an intermediate point on a transcontinental route to easterly points to which a rate of 72 cents was established because of competition with foreign products imported through ports in the East.

The rail rate of 58 cents from New Westminster to points grouped with San Francisco, and the rate of 72 cents to Los Angeles, were in effect on December 31, 1946, immediately prior to increases

Plaintiffs' Exhibit No. 2—(Continued)

established pursuant to the decision in *Increased Railway Rates, Fares, and Charges, 1946, supra*. By the addition of 20 percent, effective January 1, 1947, the rate from New Westminster to points grouped with San Francisco became 70 cents, and the rate to Los Angeles 86 cents. These rates, which complainants assail as unlawfully high, may be compared with the rates of 88 cents from New Westminster to the San Francisco group, and 110 cents to Los Angeles, which became effective in March 1938 when increased rates were established pursuant to authority granted in *Fifteen Percent Case, 1937-1938, supra*.

The complainants estimate the average weight of their shipments as 38,182 pounds per carload. The yield from the assailed rate of 70 cents from New Westminster to San Francisco, 1,034 miles, on an average carload is 25.8 cents a car-mile; the yield from the rate of 86 cents from New Westminster to Los Angeles, 1,404 miles, is 23.2 cents a car-mile. Other points specifically mentioned by complainants as destinations to which ground peat was shipped from New Westminster at the assailed rate of 86 cents include Des Moines, Iowa, 2,073 miles, Chicago, Ill., 2,239 miles, and St. Louis, Mo., 2,478 miles, to which the yields from this rate for an average carload of 38,182 pounds are 15.8, 14.6, and 13.3 cents a car-mile.

There is no evidence that can be said to afford a sound basis for a finding of unreasonableness.

Upon reconsideration, we find that the assailed

Plaintiffs' Exhibit No. 2—(Continued)

ates were applicable and are not shown to have been unjust, unreasonable, or otherwise unlawful. The findings in the prior report to the extent that they conflict with those made herein are reversed. The complaint will be dismissed.

Aldredge, Commissioner, dissenting:

I am unable to agree with the conclusions reached by the majority. In my opinion, the reasoning of Division 2 in the prior report was entirely sound, and the ultimate findings therein should be affirmed.

Admittedly, defendants violated the Commission's permissive order in Ex Parte No. 162 by increasing the basic rates on ground peat from and to the points here concerned by amounts in excess of those authorized. As these increases were named in tariffs that became effective on extremely short notice, complainants were prevented from exercising the statutory right that otherwise would have been available to point out the carriers' error and enter protest before the increased rates took effect. The majority concludes that while, as a result of such unauthorized action, "defendants are subject to censure for improper tariff publication," nevertheless "that situation alone does not afford an adequate basis for a finding of unreasonableness or an award of reparation, since we have no authority to award punitive or exemplary damages."

We are not here dealing with a question of mere reasonableness from a mathematical standpoint. The statute (section 1) demands that rates be just

Plaintiffs' Exhibit No. 2—(Continued)

as well as reasonable. In my judgment, the record does afford a sufficient basis for a finding that defendants violated section 1 of the act despite the absence of authority on our part to award punitive or exemplary damages. It is obvious that complainants were actually damaged by defendants' violation of a valid order issued by the Commission, and it is equally manifest that defendants received and have retained charges in excess of those to which they were justly entitled.

Censure, the only possible remedy suggested by the majority, would represent the judgment of the Government acting in its sovereign capacity in behalf of the public generally. It would be neither appropriate nor effective as a means of redressing private wrongs. Only an award of reparation could accomplish the latter purpose in this instance. The decision of division 2 making such an award should not, therefore, be overturned.

I am authorized to state that Commissioner Mahaffie joins in this expression.

Commissioners Johnson and Arpaia did not participate in the disposition of this proceeding.

ORDER

At a General Session of the Interstate Commerce Commission, held at its office in Washington, D.C., on the 4th day of October, A.D. 1954.

No. 29974—Acme Peat Products, Ltd., et al., vs.

Plaintiffs' Exhibit No. 2—(Continued)

Akron, Canton & Youngstown Railroad Company, et al.

No. 30260—Alouette Peat Products, Ltd., vs. Atchison, Topeka and Santa Fe Railway Company.

It appearing, That on April 7, 1950, division 2 of the Commission made and filed a report in this proceeding, and that upon petition by the defendants the proceeding was reopened for reconsideration;

It is ordered, That the complaints in these proceedings, made and filed a report on reconsideration, which report and the aforesaid report of April 7, 1950, are hereby referred to and made a part hereof.

It is ordered, That the complainant in these proceedings be, and they are hereby, dismissed.

By the Commission.

[Seal] George W. Laird, Secretary

Filed 11/5/54

Before the Interstate Commerce Commission

No. 29974—Acme Peat Products, Ltd., et al., vs. Akron, Canton & Youngstown Railroad Company, et al.

No. 30260—Alouette Peat Products, Ltd., vs. Atchison, Topeka & Santa Fe Railway Company.

Plaintiffs' Exhibit No. 2—(Continued)

PETITION FOR RECONSIDERATION OF
THE COMMISSION DECISION DATED
OCTOBER 4, 1954

Preface

The Commission decision in this case on the applicability of the rates is directly in violation of the U. S. Supreme Court decision in the following case: Illinois Central Railroad Co. vs. Van Dusen Harrington Co. (1927), 212 N.W. 940 (Minnesota), Certiorari Denied, 275 U. S. 557.

There the U. S. Supreme Court, by denying certiorari, held that where publication of a rate was not made on statutory notice as required by Section 6 of the Act, nor under authority of the short notice order of the Interstate Commerce Commission, that the filed rate was not applicable. That situation is almost identical to the one involved here.

In the following petition for reconsideration under Section 6, the specific legal reasoning on the facts herein involved is set forth.

Because of the conflict of the Commission decision here with the Supreme Court ruling outlined above, as reconfirmed in other Supreme Court cases, reconsideration should be granted.

Preliminary Statement

Reconsideration by the entire Commission of their adverse order to complainants dated October 4, 1954, is respectfully requested. In the confusing

Plaintiffs' Exhibit No. 2—(Continued)

pleadings and cross-pleadings over this six year litigation period, key evidence and law has been omitted, particularly regarding the applicability of the assailed increase.

This case involves carload shipments of peat from British Columbia to points in the United States during the year 1947 and the first three months of 1948. The entire problem involves the Ex Parte 162 increase. The railroads subsequent to those dates changed their tariffs to comply with the Commission order. The question is solely the legal applicability under Section 6 and the reasonableness under Section 1 and the prejudice under Section 3. The big error of law was made on the applicability of the increase.

From a public policy standpoint the decision of the Commission of October 4th is bad. That decision in effect gives the railroads a "blank check" to violate Commission orders with impunity. It shifts the burden caused by the Commission-found censorable acts of the railroads to the shippers and the Commission. There is no question the railroads violated the I. C. C. order in Ex Parte 162. There is no question that they charged west coast shippers a full 20% increase while giving their eastern competitors only a 6c per 100 lbs. maximum increase. As the decision stands now, the railroads go scot free, the very sole of equity is violated, and the Interstate Commerce Commission is put into a position where their orders in general increase cases mean virtually nothing as maximum orders.

Plaintiffs' Exhibit No. 2—(Continued)

The Commission overlooked in this case one all-important legal point which can solve the entire matter involved here, and which will give the Commission orders in Ex Parte increase cases some "teeth" which they now lack.

Legally there was no authority for any increase on peat on January 1, 1947. The increase legally could only be applied when the carriers published their tariffs in compliance with Section 6 (3) of the Act.

We have set forth in part I below the step-by-step legal reasoning, which if followed by the Commission in this case, (1) solves this case with fairness to the small shippers involved; (2) in the future forces the railroads in Ex Parte cases to meticulously comply with I. C. C. orders or lose any increase until they do; and (3) gives the railroads exactly what the I. C. C. finds proper and nothing more.

For the reasons outlined below, we respectfully urge reconsideration, for substantial error of law has been made. If reconsideration is granted because of the error in the applicability of the rates involved here, no decision is necessary under Sections 1 or 3 of the Act. Decision under Section 6 would conclude the case. The complaint in this case specifically alleges and covers the Section 6 violation. The law is clear. The complaint is complete on all counts. Our reasons for reconsideration follow below.

Plaintiffs' Exhibit No. 2—(Continued)

I.

The Assailed Rates Were Violations of Section 6
The defendants' rate increase (in its entirety) involved here on peat was wholly illegal. Here are the specific legal authority why the I. C. C. must reverse its finding that the rates were applicable. The increased rates on peat were not legally published.

(1) Only rates which are legally filed and published can be applied. The point is so well established citation is unnecessary. The rates to be binding must meet the requirements of Section 6(3) of the Act. Legal notice of rates is chargeable only when the rates are legally published.

The U. S. Supreme Court said:

"Tariffs filed with the Commission without statutory authorization conveys no notice." *Southern Pacific vs. U. S.*, 272 U. S. 445. (Underscoring line.)

That is the situation here on peat.

"A change in a rate must be in the way prescribed by law." *U. S. vs. Standard Oil Co.*, 148 Fed. 719.

"A carrier may not arbitrarily set aside its tariff provisions without due notice in the proper form." *Lexington Elevator & Mill Co. vs. B. & O. Railroad Co.*, 109 I. C. C. 542.

"Special permission granted carriers to establish rates on less than statutory notice has no effect on rates until they have been filed in accordance with

Plaintiffs' Exhibit No. 2—(Continued)

requirement of the Act." *Oklahoma Portland Cement Co. vs. A. T. & S. F.*, 93 I. C. C. 203.

(2) The assailed rate increase was inapplicable for the reason they failed to comply with the law. The law of the land is clear. Section 6(3) of the Interstate Commerce Act is specific. It says:

"No change shall be made in the rates, fares and charges or joint rates, fares and charges which have been filed and published by any common carrier in compliance with the requirements of this section, except after thirty days' notice to the Commission and to the public published as aforesaid, which shall plainly state the changes proposed to be made in the schedule then in force and the time when the changed rates, fares or charges will go into effect; and the proposed changes shall be shown by printing new schedules or shall be plainly indicated upon the schedules in force at the time and kept open to public inspection: Provided that the Commission may, in its discretion and for good cause shown, allow changes upon less than notice herein specified, or modify the requirements of this section in respect to publishing, posting, and filing of tariffs, either in particular instances or by a general order applicable to special or peculiar circumstances or conditions * * *" (Underscoring mine.)

(3) The only authority for less than that legal statutory notice of thirty days filing, etc., in this case must be in the Commission's order in "Ex

Plaintiffs' Exhibit No. 2—(Continued)

Porte 162. Increased Railway Rates, Fares & Charges, 1946", 266 I.C.C. 537, 617.

That order, Finding 14, on page 617, giving short notice publication authority, said:

"The increases in freight rates and charges herein authorized shall supersede and be in lieu of the emergency increases authorized in our prior (interim) report and order of June 20, 1946. The authorized increased rates and charges may be made effective in the period January 1, 1947 to February 28, 1947, upon not less than five days' notice to the Commission and to the general public, by filing and posting in the manner prescribed in the Interstate Commerce Act." (Underscoring mine.)

(4) The only I.C.C. authorized increase on peat in Ex Parte 162 order was a 20% increase subject to a 6c maximum increase per 100 pounds.

Finding 3 in that order, insofar as it applies to peat, reads as follows:

"The basic freight rates and charges on the commodities specified in Appendix 1 (which covers peat) may be increased by the specific percentages or amounts shown therein (on peat 20% increase, subject to a maximum of 6c per 100 pounds), and such rates increased as provided therein, will be just and reasonable for the future." (Parentheses insertions mine.)

That point is not debatable, for the railroads, and the entire Commission twice have found that is just what the Ex Parte 162 order said.

Plaintiffs' Exhibit No. 2—(Continued)

(5) The defendants admittedly did not comply with that Ex Parte 162 order on peat. The five days' notice authority applied only to the increases authorized in that order.

(6) The tariff filed by the defendants effective January 1, 1947 was not authorized by the Interstate Commerce Commission on peat.

(7) We then have the situation of the defendants trying (and succeeding) in charging the shippers a 20% increase on peat (in 1947 and part of 1948) under a claim that the increase was "published" with legal notice.

(8) Actually there was no publication of any kind as required by law. The Ex Parte 162 tariff order did not authorize a "publication" of a full 20% increase on peat with no 6c maximum. Therefore there was no five day authority to increase peat rates by 20% to be effective January 1, 1947.

(9) Manifestly the carriers did not make any tariff publication on thirty days' notice increasing peat rates a flat 20%. There was no publication on statutory notice required by Section 6 of the Act.

(10) Therefore there was no publication authorized by the Ex Parte 162, nor otherwise. Without such legal publication the defendants cannot legally charge the 20% increase they did on January 1, 1947.

Publication of rates required by law is all essential. Without legal publication no rate increase could be applied.

The courts have said:

Plaintiffs' Exhibit No. 2—(Continued)

"A change in rates must be made in the way prescribed by law." U. S. vs. Standard Oil Co., 148 Fed. 719. Also "American Sugar Refining Co. vs. D. L. & W. Railroad Co.", 207 Fed. 733.

(11) This is no case of an erroneously "published" rate being legally applicable even though in contravention of an I. C. C. order. There actually was no legal publication of any kind. There is no authority of any kind for a flat 20% increase on peat.

(12) Mere I. C. C. filing of the X-162 Increase Tariff (Agent L. E. Kipp's X-162, I. C. C. A-3657) did not legalize a flat 20% increase on peat under Section 6 of the Interstate Commerce Act. Thirty days' notice was not given. The short notice publication authorized by the Interstate Commerce Commission in its Ex Parte 162 order manifestly did not authorize the flat 20% increase on peat.

Section 6 of the Act required thirty days' notice or "for good cause shown" to allow lesser time notice. Here the I. C. C. order in Ex Parte 162 (decided December 5, 1946) did not authorize the short notice on that peat increase. No other order "for good cause shown" authorized the excessive peat rate increase. Nothing was "shown". No "good cause" was even hinted. The January 1, 1947 increase of 20% on peat was without even a shadow of legal authority. Mere "filing of a tariff with the I. C. C." does not reach the legal requirements of the second part of Section 6 (3) of the Act.

(13) The only legal rates which were applicable

Plaintiffs' Exhibit No. 2—(Continued)

were the basic rates in effect on June 30, 1946 on peat. Those rates remain in effect. The increase of January 1, 1947 cannot be applied to peat for the reasons outlined above. The temporary 6% (X-148) increase authorized in the June 20, 1946 order in Ex Parte 162, 264 I. C. C. 695, cannot be continued after December 31, 1946 on peat because the railroads cancelled those tariffs in their entirety on all traffic (including peat traffic), in Agent L. E. Kipp's 2-P, I. C. C. 1527, Supplement 10, page 2; and in Agent W. J. Bohon's 65-F, I. C. C. 77, Supplement 90, page 2; and in Agent J. P. Haynes' 1-S, I. C. C. 1352, Supplement 53, page 2.

Therefore, the basic peat rates legally remained on all identified shipments (on the appendix to the complaint) until the following dates from January 1, 1947 to:

W. T. L., Illinois & S. W. L. Territory to December 1, 1947.

Official Territory Area to February 1, 1948.

Southern Territory Area to March 29, 1948.

Southern California Area to January 1, 1948.

Northern California Area to March 5, 1952.

Mountain-Pacific Territory (Balance) to March 29, 1948.

(14) Sound public policy supports the conclusion here set forth. Right now the Interstate Commerce Commission says the railroads are subject to censure for their action here. The carriers did wrong, yet the I. C. C. (rightly or wrongly) says it can do nothing to correct the injury to the victims.

Plaintiffs' Exhibit No. 2—(Continued)

In effect, the Interstate Commerce Commission by this peat decision is giving the railroads a "blank check" to violate I. C. C. orders with impunity.

This new approach will give the Interstate Commerce Commission some "teeth" to force meticulous compliance with their future orders. This puts the burden on the carriers to obey the I. C. C. order or lose any increase until they do.

That is fair to shippers. They won't have to sue on every illegally-padded rate to get what the I. C. C. ordered. This is fair to the railroads, for if they do the job right, they get everything the I. C. C. ordered for them. It prevents railroad wrongs forming the basis for the railroads' unjustified enrichment. This is fair to the Interstate Commerce Commission, for it gives the I. C. C. an enforceable power to see that their orders are complied with.

II.

The Reconsideration Order on Which the Last Commission Order Was Based Is Improper

The whole order of October 4, 1954 and decision is improper in that it is based on "Petition of Defendants" dated March 2, 1954. That petition is in violation of Rule 101 (f) of the Commission Rules of Practice promulgated under Section 17 of the Interstate Commerce Act. The Commission entertained two (2) successive petitions on the same ground. That is improper.

The Commission has said:

"The law contemplates that the Commission

Plaintiffs' Exhibit No. 2—(Continued)
make rules of practice, and compliance is in the interest of justice to all parties.”

Paducah Board of Trade vs. I. C. R. Co., 43
I.C.C. 537.

Railroad Comm. of Wisconsin vs. Aberdeen
R. R. Co., 142 I. C. C. 199.

The Commission rules have the power of law. Unless they are complied with, the pleadings are improper.

Purse Bros. vs. N. C. & St. L. Ry., 221 I.C.C.
4, 5.

It is manifestly improper to allow the railroads here the right to violate the General Rules of Practice and restrict all other practitioners to the rules. Complainants have not been given due process of law required by the Constitution.

The defendants' petition for reopening and reconsideration should have been summarily declined without any further action.

III.

The I. C. C. Has Directly Conflicting Findings In This Case

The whole problem originated in *Ex Parte* 162, Increased Railway Rates, Fares & Charges, 1946, 266 I. C. C. 537, 615, 623. There the Commission found, on page 615,

“The basic rates and charges on the commodities (which includes peat) specified in Appendix I may be increased by the specific percentages or amounts shown therein, and such rates increased as pro-

Plaintiffs' Exhibit No. 2—(Continued)

ded therein, will be just and reasonable for the future." (Underscoring mine.)

Today, in 1954, in this case, all the Commissioners who were on the Commission then reaffirmed their 1946 decision. The injury involved herein took place in 1947 and early 1948 as a result of that 1946 decision. The new members of the Commission who were not on the Commission in 1946, 1947 or 1948 now have the Commission finding in direct conflict with its 1946 finding on the same commodity on the same increase. Here they find:

"Upon reconsideration, we find that the assailed rates were applicable, and are not shown to have been unjust, unreasonable or otherwise unlawful." (Sheet 6-7) (Underscoring mine.)

Such conflicting finding cannot possibly be reconciled. The Commission erred here in substituting its decision on a 1954 case for the considered and unanimous judgment of the Commission in 1946. It is patently unjust to evaluate 1947 records and earnings on 1954 standards. That was done here.

IV.

The Commission Erred in Their Finding That the Rates Were Not Unduly Prejudicial and in Violation of Section 3. (Sheet 2)

Counsel for the railroad defendants frankly stated (page 185, Oral Argument—11/17/49),

"I agree with counsel (for complainants) that he showed through his witnesses that because the com-

Plaintiffs' Exhibit No. 2—(Continued)

plainants' rates were raised relatively higher than the rates of their competition had been raised from the sources of supply in Wisconsin and Eastern Canada, it was more difficult for them to reach the Midwestern and Eastern markets."

On page 188 of the same Oral Argument, defendants' counsel admitted:

"I will also concede with counsel that in the East and the South peat is carried with the fertilizer group and therefore is grouped in your tariffs under your fertilizer rates."

Complainants showed direct and specific injury under Section 3 to support an award of damages under Section 3 and also Sections 1 and 6. (See T. 16, 21, 22, 23, 24, 99, etc.) The Commission erred in ignoring this evidence.

V.

The Commission Erred in Making No Finding of Fact to Support Its Conclusion of Law That the Assailed Rates Were Not Unreasonable.

The defendants' own chief counsel admitted that the basic rate plus 6 cents was just and reasonable. He said, (T. 190)

"We feel it is a just and reasonable rate, but we put it in because in our discretion we were losing traffic and revenue."

The same defendants admitted (T. 193) their Ex Parte increase brought about varying results in different sections of the nation.

Defendants voluntarily reduced their high rates

Plaintiffs' Exhibit No. 2—(Continued)

on peat in eleven months after they increased it. It was more than the traffic could bear.

Look at the lowest carload rates to a common destination such as Chicago in 1947 before any Ex Parte increase:

From British Columbia to Chicago, Ill.: \$0.72.

From New York Port to Chicago, Ill.: \$0.38* (European Imports).

From New Orleans Port to Chicago, Ill.: \$0.30* (European Imports).

From Port Colbourne, Ont. to Chicago, Ill.: \$0.30.

* Carriers absorb terminal charges and carloading expenses and give two cars for one on shipments imported.

Exhibit 6 sets forth the fact that on peat the assailed rates are the highest in the nation. If the basic rates are the highest in the U. S. on peat by any standard, how can it be reasonable to increase them 20% more and then increase the lesser competitive rates only 6c per 100 pounds?

Nowhere does the Commission set forth one single finding to support its conclusion of law that the assailed rates were not unreasonable. They merely said:

“There is no evidence that can be said to afford a sound basis for a finding of unreasonableness.” (Sheet 6)

There must be a specific finding of fact to support a conclusion of law.

To look at earning on 1947 traffic seven years later in 1954 is like comparing prices on coffee to-

Plaintiffs' Exhibit No. 2—(Continued)

day with what they were in 1947. Inflation has come. It is difficult for people today to properly evaluate 1947 evidence.

The so-called reduction in the basic peat rates prior to World War II on which defendants place so much emphasis is fantastic. All they did was establish commodity rates on peat to take care of prospective traffic that did develop. Everyone knows class rates from, to and within Mountain-Pacific Territory move virtually no carload traffic. Peat was no exception. Normal commodity rates to replace the impossible class rates (now under I. C. C. investigation) was all that was done. They set those rates to the limit the market would stand, as this case proves. We are not dealing with depressed rates in any sense.

This is a very, very cheap commodity selling for from slightly over 11½ cents to 1¾ cents per pound, packed in bales and loaded in a box car. There were totally negligible loss and damage claims. There was a regular year in and year out movement until these freight increases killed it. There is every basis on record to find the uneven increase unjust and unreasonable.

VI.

The Commission Erred in Using the "Bolghiana"
Case as Precedent in This Case

The majority of the I. C. C. held the "F. W. Bolghiana & Co., Inc., vs. B. & O. R. Co.", 291 I. C. C. 659, supporting precedent for their decision here.

Plaintiffs' Exhibit No. 2—(Continued)

The factual situation here is wholly dissimilar. Where the I. C. C. had earlier prescribed maximum reasonable rates on humus. The assailed rates were here less than the I. C. C. prescribed rates. The Commission did have a difficult situation there.

Here no such I. C. C. prescribed rates are involved. All involved rates are carrier-made rates.

Here in this peat case we have the basic peat rates long-established and maintained by the railroads. That is the best possible proof of reasonableness, all factors considered. See *Skinner & Eddy Corp. vs. U. S.*, 249 U. S. 557.

The Commission made a very substantial error in throwing this case into the principle decided in the 'Bolgiana' case.

Conclusion

This petition is properly filed within sixty days of the Commission order in accordance with Rule 101 (e) of the General Rules of Practice. No prior petition for reconsideration has been made. The point involved is a crucial one, both for the small shippers here and for the good of the Commission as a whole.

We do feel that the errors of law and the confusions of this case have created a situation which is not good for the good of the Commission nor for the public as a whole. The point is important for these shippers today, but for all the public tomorrow. We believe an oral argument clearly and concisely going over the matters raised herein is in the

Plaintiffs' Exhibit No. 2—(Continued)
interests of all. We respectfully request oral argument.

Respectfully submitted,

/s/ Fred H. Tolan,
Registered Practitioner

Certificate of Service attached.

* * * * *

Filed 1/15/55

ORDER

At a General Session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 3rd day of January, A.D. 1955.

No. 29974—Acme Peat Products, Ltd., et al., vs. Akron, Canton & Youngstown Railroad Company, et al.

No. 30260—Alouette Peat Products, Ltd., vs. Archison, Topeka & Santa Fe Railway Company.

Upon consideration of the record in the above-entitled proceedings, petition of complainants for reconsideration and oral argument, and the reply of defendants; and it appearing that petitioners have not shown substantial and material reasons to warrant granting their petition:

It is ordered, That said petition be, and it is hereby, denied.

By the Commission.

[Seal]

George W. Laird, Secretary

SUPPLEMENT No. TO TARIFF No. I. C. C. No.

L. SUPPLEMENT TO C. T. C.
D. STATE COMMISSION
MEMBERS SHOWN HEREINSPECIAL SUPPLEMENT TO I. C. C.
NUMBERS SHOWN HEREIN**SPECIAL SUPPLEMENT TO TARIFFS**

ISSUED BY

TRANS-CONTINENTAL FREIGHT BUREAU**L. E. KIPP, AGENT**

AND BY HIM JOINTLY WITH

DOE, Agent

S. W. CURLETT, Agent**B. T. JONES, Agent****APPLYING IN CONNECTION WITH****PARTICIPATING CARRIERS SHOWN IN TARIFFS AND SUPPLEMENTS
THERETO ENUMERATED HEREIN****INCREASE IN RATES AND CHARGES**

cept as otherwise provided, rates and charges in Tariffs enumerated herein and in prior supplements thereto, to each tariffs this is a special supplement are hereby increased as provided in Tariff of Increased Rates and Charges No. X-162, E. Kipp's I. C. C. No. A-3657, M. F.-I. C. C. No. A-190, C. T. C. No. A-966, P. U. C. Ore. No. 118, supplements thereto and all other provisions thereof.

provisions of this supplement (including the cancellation of prior supplements and the cancellation on page 2 hereof) apply

to rates on intrastate traffic moving between points in, and transported wholly within, the State of Oregon, nor to charges on intrastate traffic, nor

to any rate applicable via an interstate route on a given interstate shipment moving between points in Oregon, between which points there is an intrastate rate of the same amount applicable on a like shipment via any route wholly within the State of Oregon in any tariff on file with the Interstate Commerce Commission nor to charges applicable in connection with said interstate shipment

authorized by a letter-number (e. g., K-1, K-2, etc.) supplement to Tariff of Increased Rates and Charges referred to which shall specify the increases applicable to such rates and charges, and which shall be filed with the Interstate Commerce Commission and State Commission.

provisions of this supplement will **not** apply between points in, and transported wholly within the Dominion of Canada and points in Canada moving through points in the United States.

a tariff enumerated herein or a prior supplement thereto contains rates or charges to become effective upon a date subsequent to the effective date of this supplement, such rates or charges will, on their effective date, be increased as provided in Tariff of Increased Rates and Charges referred to above.

the form of this special supplement is permitted by authority of Interstate Commerce Commission, Permission No. 31715, dated December 19, 1946.

ED DECEMBER 21, 1946**EFFECTIVE JANUARY 1, 1947**

is supplement is exempt from the terms of Rule 9 (c) of Tariff Circular No. 20 under permission of the Interstate Commerce Commission No. 31715 of December 19, 1946.

ued on five days' notice under authority of order dated December 5, 1946, of the Interstate Commerce Commission, Order No. 162 and Ex Parte No. 118, and Board of Transport Commissioners for Canada Order No. 68310 of December 19, 1946.

S. CURLETT, Agent,
143 Liberty Street,
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B. T. JONES, Agent,
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ISSUED BY

L. E. KIPP, Agent,
516 West Jackson Blvd.,
CHICAGO 6, ILL.

(File No. 6-July 20 Sup. 94-M)

U. S. A.)

(C. P.-49011)

CANCELLATION

All provisions in Tariffs enumerated herein, or in supplements thereto, which subject Rates and Charges in said Tariffs and supplements thereto to Tariff of Increased Rates and Charges No. X-148, Agent L. E. Kipp's I. C. C. No. A-3386, M. F.-I. C. C. No. A-117, C. T. C. No. A-890, Ore. P. U. C. No. 87, are hereby cancelled.

All rates in Tariffs enumerated herein, or in supplements thereto, which are not subject to Tariff of Increased Rates and Charges No. X-148 referred to above and which are published as being applicable until modified or terminated in further proceedings in Ex Parte 148-162, or other proceedings, are hereby cancelled. Rates and Charges which were temporarily superseded thereby again become effective, subject to the provisions of Tariff of Increased Rates and Charges No. X-162 referred to on the title page hereof.

LIST OF TARIFFS SUPPLEMENTED HEREBY

Supplement No.	TO (L. E. Kipp, Agent, except as noted)				COMMODITY
	Tariff No.	I. C. C. No.	C. T. C. No.	State Commission Nos.	
97	1-Y	1507 ① 512 ② A-809 ③ 3905 MF-B-31	801 ① 432 ② A-548 ③ 1910		General Commodities.
		1524 ① 547 ② A-846 ③ 4049 MF-B-45	820 ① 462 ② A-576 ③ 1970		
(3) 20	1-Z				General Commodities.
10	2-P	1527 MF-B-46	822		General Commodities.

adities

INCREASES IN LINE-HAUL CARLOAD RATES ON COMMODITIES NAMED IN ITEMS NOS. 15 TO 299

The line-haul carload rates on the commodities named in Items Nos. 15 to 299, inclusive, are increased as provided in such items.

Item No.	COMMODITY	INCREASE
103	Earth, diatomaceous or infusorial	Apply Table 1, maximum 6 cents per 100 pounds, or \$1.20 per net ton.
105	<p>Feed, Animal or Poultry, viz.:</p> <p>Biscuits, Dog, whole, broken or ground</p> <p>Blood Flour; Blood or Meat Meal; Feeding Tankage or Dried Meat Scraps</p> <p>Bone Meal or Ground Bones (See Note 1)</p> <p>Feed, Animal or Poultry (NOIBN)</p> <p>Fish Food, NOIBN</p> <p>Fish Scrap and Fish Meal</p> <p>Flavin Concentrate</p> <p>Milk, Buttermilk or Whey, condensed or dried (See Note 1)</p> <p>Milk Powder Scrap, cake or ground, or Whey Refuse (Milk Albumen) dry or Sour Skim Milk</p> <p>Poultry Grit</p> <p>Note 1—Containers must be so branded, labeled or marked as to plainly indicate that they contain Animal or Poultry Feed.</p>	See ⑥.
107	Fertilizer and articles listed in tariffs making reference to this tariff, as and when taking fertilizer rates	Apply Table 1, maximum 6 cents per 100 pounds, or \$1.20 per net ton.

* * * * *

Plaintiffs' Exhibit No. 4--(Continued)

TABLE OF RATES In Cents

TABLE 1

applies to all rates except rates increased specific amounts where provided in Items Nos. 3 to 307, inclusive, and rates increased under Tables 2, 3, 4 and 6.

Not Over	B	A		B	A		B	A		B	A		B	A		B	A		B
		Over	Not Over		Over	Not Over		Over	Not Over		Over	Not Over		Over	Not Over				
03		N. C.	32 08	32 91	39	85 41	86 24	103	137 91	138 74	166	190 41	191 24	229	242 91	243 74	292		
04	05		32 91	33 74	40	86 24	87 08	104	138 74	139 58	167	191 24	192 08	230	243 74	244 58	293		
09	06		33 74	34 58	41	87 08	87 91	105	139 58	140 41	168	192 08	192 91	231	244 58	245 41	294		
17	16		34 58	35 41	42	87 91	88 74	106	140 41	141 24	169	192 91	193 74	232	245 41	246 24	295		
30	30		35 41	36 24	43	88 74	89 58	107	141 24	142 08	170	193 74	194 58	233	246 24	247 08	296		
42	46		36 24	37 08	44	89 58	90 41	108	142 08	142 91	171	194 58	195 41	234	247 08	247 91	297		
53	60		37 08	37 91	45	90 41	91 24	109	142 91	143 74	172	195 41	196 24	235	247 91	248 74	298		
66	76		37 91	38 74	46	91 24	92 08	110	143 74	144 58	173	196 24	197 08	236	248 74	249 58	299		
78	90		38 74	39 58	47	92 08	92 91	111	144 58	145 41	174	197 08	197 91	237	249 58	250 41	300		
91	11		39 58	40 41	48	92 91	93 74	112	145 41	146 24	175	197 91	198 74	238	250 41	251 24	301		
1 14	11		40 41	41 24	49	93 74	94 58	113	146 24	147 08	176	198 74	199 58	239	251 24	252 08	302		
3 35	13		41 24	42 08	50	94 58	95 41	114	147 08	147 91	177	199 58	200 41	240	252 08	252 91	303		
1 56	13		42 08	42 91	51	95 41	96 24	115	147 91	148 74	178	200 41	201 24	241	252 91	253 74	304		
1 77	2		42 91	43 74	52	96 24	97 08	116	148 74	149 58	179	201 24	202 08	242	253 74	254 58	305		
1 97	21		43 74	44 58	53	97 08	97 91	117	149 58	150 41	180	202 08	202 91	243	254 58	255 41	306		
2 18	21		44 58	45 41	54	97 91	98 74	118	150 41	151 24	181	202 91	203 74	244	255 41	256 24	307		
2 39	2		45 41	46 24	55	98 74	99 58	119	151 24	152 08	182	203 74	204 58	245	256 24	257 08	308		
2 60	2		46 24	47 08	56	99 58	100 41	120	152 08	152 91	183	204 58	205 41	246	257 08	257 91	309		
2 81	31		47 08	47 91	57	100 41	101 24	121	152 91	153 74	184	205 41	206 24	247	257 91	258 74	310		
3 02	31		47 91	48 74	58	101 24	102 08	122	153 74	154 58	185	206 24	207 08	248	258 74	259 58	311		
3 22	31		48 74	49 58	59	102 08	102 91	123	154 58	155 41	186	207 08	207 91	249	259 58	260 41	312		
3 43	4		49 58	50 41	60	102 91	103 74	124	155 41	156 24	187	207 91	208 74	250	260 41	261 24	313		
3 64	4		50 41	51 24	61	103 74	104 58	125	156 24	157 08	188	208 74	209 58	251	261 24	262 08	314		
3 85	4		51 24	52 08	62	104 58	105 41	126	157 08	157 91	189	209 58	210 41	252	262 08	262 91	315		
4 06	4		52 08	52 91	63	105 41	106 24	127	157 91	158 74	190	210 41	211 24	253	262 91	263 74	316		
4 27	6		52 91	53 74	64	106 24	107 08	128	158 74	159 58	191	211 24	212 08	254	263 74	264 58	317		
4 79	6		53 74	54 58	65	107 08	107 91	129	159 58	160 41	192	212 08	212 91	255	264 58	265 41	318		
5 20	6		54 58	55 41	66	107 91	108 74	130	160 41	161 24	193	212 91	213 74	256	265 41	266 24	319		
5 62	6		55 41	56 24	67	108 74	109 58	131	161 24	162 08	194	213 74	214 58	257	266 24	267 08	320		
6 04	7		56 24	57 08	68	109 58	110 41	132	162 08	162 91	195	214 58	215 41	258	267 08	267 91	321		
6 45	7		57 08	57 91	69	110 41	111 24	133	162 91	163 74	196	215 41	216 24	259	267 91	268 74	322		
6 87	8		57 91	58 74	70	111 24	112 08	134	163 74	164 58	197	216 24	217 08	260	268 74	269 58	323		
7 29	8		58 74	59 58	71	112 08	112 91	135	164 58	165 41	198	217 08	217 91	261	269 58	270 41	324		
7 70	9		59 58	60 41	72	112 91	113 74	136	165 41	166 24	199	217 91	218 74	262	270 41	271 24	325		
8 12	9		60 41	61 24	73	113 74	114 58	137	166 24	167 08	200	218 74	219 58	263	271 24	272 08	326		
8 54	10		61 24	62 08	74	114 58	115 41	138	167 08	167 91	201	219 58	220 41	264	272 08	272 91	327		
9 58	11		62 08	62 91	75	115 41	116 24	139	167 91	168 74	202	220 41	221 24	265	272 91	273 74	328		
10 41	12		62 91	63 74	76	116 24	117 08	140	168 74	169 58	203	221 24	222 08	266	273 74	274 58	329		
11 24	13		63 74	64 58	77	117 08	117 91	141	169 58	170 41	204	222 08	222 91	267	274 58	275 41	330		
12 08	14		64 58	65 41	78	117 91	118 74	142	170 41	171 24	205	222 91	223 74	268	275 41	276 24	331		
12 91	15		65 41	66 24	79	118 74	119 58	143	171 24	172 08	206	223 74	224 58	269	276 24	277 08	332		
13 74	16		66 24	67 08	80	119 58	120 41	144	172 08	172 91	207	224 58	225 41	270	277 08	277 91	333		
14 58	17		67 08	67 91	81	120 41	121 24	145	172 91	173 74	208	225 41	226 24	271	277 91	278 74	334		
15 41	18		67 91	68 74	82	121 24	122 08	146	173 74	174 58	209	226 24	227 08	272	278 74	279 58	335		
16 24	19		68 74	69 58	83	122 08	122 91	147	174 58	175 41	210	227 08	227 91	273	279 58	280 41	336		
17 08	20		69 58	70 41	84	122 91	123 74	148	175 41	176 24	211	227 91	228 74	274	280 41	281 24	337		
17 91	21		70 41	71 24	85	123 74	124 58	149	176 24	177 08	212	228 74	229 58	275	281 24	282 08	338		
18 74	22		71 24	72 08	86	124 58	125 41	160	177 08	177 91	213	229 58	230 41	276	282 08	282 91	339		
19 58	23		72 08	72 91	87	125 41	126 24	161	177 91	178 74	214	230 41	231 24	277	282 91	283 74	340		
20 41	24		72 91	73 74	88	126 24	127 08	162	178 74	179 58	215	231 24	232 08	278	283 74	284 58	341		
21 24	25		73 74	74 58	89	127 08	127 91	163	179 58	180 41	216	232 08	232 91	279	284 58	285 41	342		
22 08	26		74 58	75 41	90	127 91	128 74	164	180 41	181 24	217	232 91	233 74	280	285 41	286 24	343		
22 91	27		75 41	76 24	91	128 74	129 58	165	181 24	182 08	218	233 74	234 58	281	286 24	287 08	344		
23 74	28		76 24	77 08	92	129 58	130 41	166	182 08	182 91	219	234 58	235 41	282	287 08	287 91	345		
24 58	29		77 08	77 91	93	130 41	131 24	167	182 91	183 74	220	235 41	236 24	283	287 91	288 74	346		
25 41	30		77 91	78 74	94	131 24	132 08	168	183 74	184 58	221	236 24	237 08	284	288 74	289 58	347		
26 24	31		78 74	79 58	95	132 08	132 91	169	184 58	185 41	222	237 08	237 91	285	289 58	290 41	348		
27 08	32		79 58	80 41	96	132 91	133 74	170	185 41	186 24	223	237 91	238 74	286	290 41	291 24	349		
27 91	33		80 41	81 24	97	133 74	134 58	171	186 24	187 08	224	238 74	239 58	287	291 24	292 08	350		
28 74	34		81 24	82 08	98	134 58	135 41	172	187 08	187 91	225	239 58	240 41	288	292 08	292 91	351		
29 58	35		82 08	82 91	99	135 41	136 24	173	187 91	188 74	226	240 41	241 24	289	292 91	293 74	352		
30 41	36		82 91	83 74	100	136 24	137 08	174	188 74	189 58	227	241 24	242 08	290	293 74	294 58	353		
31 24	37		83 74	84 58	101	137 08	137 91	175	189 58	190 41	228	242 08	242 91	291	294 58	295 41	354		
32 08	38		84 58	85 41	102														

[Endorsed]: No. 15276, 77. United States Court of Appeals for the Ninth Circuit. Chicago, Milwaukee, St. Paul and Pacific Railroad Company, Union Pacific Railroad Company, Southern Pacific Company, Great Northern Railway Company and Northern Pacific Railway Company, Appellants, vs. Alouette Peat Products, Ltd., et al., Appellees. Interstate Commerce Commission, Appellant, vs. Alouette Peat Products, Ltd., et al., Appellees. Transcript of Record. Appeals from the United States District Court for the Western District of Washington, Northern Division.

Filed: September 14, 1956.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 15276-7

INTERSTATE COMMERCE COMMISSION, et
al., Appellants,

VS.

ALOUETTE PEAT PRODUCTS, LTD., et al.,
Appellees.

STATEMENT OF POINTS ON WHICH APPELLANT, INTERSTATE COMMERCE COMMISSION, INTENDS TO RELY ON APPEAL AND DESIGNATION OF PORTIONS OF RECORD TO BE PRINTED

Points

The points on which appellant, Interstate Commerce Commission, intends to rely on appeal are as follows:

I.

The District Court erred in finding—

“That the increase in rates damaged the plaintiffs in this case by causing a loss of market.” (Finding No. VII.)

In so holding, the Court exceeded its jurisdiction by substituting its judgment for that of the Commission on a question of fact.

II.

The District Court erred in concluding—

"That the action of the defendant carriers in pub-

lishing tariffs on shortened notice, not authorized by Ex Parte 162 referred to in the Findings herein, was illegal and void. That accordingly the defendant carriers were not entitled either to exact the 20% increase or the 6 cent maximum permitted under Ex Parte 162. That the rates which were in effect immediately before the initiation of the proceedings by the defendant railroads for the purpose of obtaining an increase in the rates were the legal rates applicable to these shipments here in question at the time they were made, and that all rates applied to plaintiffs' shipments and all sums of money exacted from plaintiffs by applying such freight rates to the extent of the excess of such rates over said prior existing approved rates are and were illegal and void and without legal right, since said rates were not authorized by law nor promulgated in the manner provided by law nor in the manner specifically and expressly conditioned by the Interstate Commerce Commission." (Conclusion of Law No. II.)

III.

The District Court erred in concluding—
"That the Interstate Commerce Commission violated its own rules and as a result thereof denied the plaintiffs due process by granting a second petition of the railroads for reconsideration as more particularly set forth in its Order of June 21, 1954." (Conclusion of Law No. IV.)

IV.

The District Court erred in concluding—

"That the plaintiffs are entitled to judgment against the defendants, and each of them directing that the orders heretofore made by the Interstate Commerce Commission be reversed, and that these causes above-captioned be remanded to the Interstate Commerce Commission for the fixing of the amount of reparations due the plaintiffs, together with interest thereon, and the entry of a reparations order consistent with the findings of fact, conclusions of law and judgment herein entered." (Conclusion of Law No. V.)

V.

The District Court erred in failing to sustain the Commission's conclusion that the complainants before it had failed to establish any violation of the Interstate Commerce Act for which they were entitled to reparation.

VI.

The District Court erred in entering judgment remanding the proceedings to the Commission for the purpose of entering a reparation order.

Designation

The Interstate Commerce Commission adopts as and for its Designation of Record for printing those portions of the record herein designated by the appellant railroads and, in addition thereto, the following:

1. Answers of the United States of America.
2. Intervention and Answers of the Interstate Commerce Commission.
3. The following portions of the record before

he Interstate Commerce Commission in Docket No. 29974 as certified by said Commission to the District Court:

- (a) Commission report and order dated April 7, 1950;
- (b) Commission order dated January 7, 1952;
- (c) Commission order dated December 30, 1953;
- (d) Petition for leave to file petition to reopen and reconsider received March 8, 1954;
- (e) Petition to reopen for reconsideration filed June 21, 1954;
- (f) Commission order dated June 21, 1954;
- (g) Report and order of the Commission on reconsideration filed October 4, 1954;
- (h) Petition for reconsideration filed November 1954;
- (i) Commission order dated January 3, 1955.

4. Notice of Appeal by Interstate Commerce Commission.

5. This Statement of Points on which appellant, Interstate Commerce Commission, intends to rely on appeal and designation of portions of record to be printed.

Dated at Washington, D. C., this 21st day of September, 1956.

/s/ ROBERT W. GINNANE,
General Counsel

/s/ C. H. JOHNS,
Assistant General Counsel, Interstate Commerce
Commission, Washington 25, D. C.

[Endorsed]: Filed September 25, 1956. Paul P. Brien, Clerk.

In the United States Court of Appeals
for the Ninth Circuit

No. 15277

CHICAGO, MILWAUKEE, ST. PAUL AND
PACIFIC RAILROAD COMPANY, et al.,
Appellants,

vs.

ACME PEAT PRODUCTS, LTD., et al.,
Appellees.

STATEMENT OF POINTS ON WHICH IN-
TERVENING RAILROAD APPELLANTS
INTEND TO RELY ON APPEAL, AND
DESIGNATION OF PORTIONS OF THE
RECORD TO BE PRINTED

Points

The points upon which the intervening railroad appellants intend to rely on appeal are as follows:

I.

The District Court erred in finding and concluding that the intervening railroad appellants, when they published their rates, failed to comply with the order of the Interstate Commerce Commission, dated December 5, 1946, entered in Ex Parte 162, Increased Railway Rates, Fares and Charges, 1946. (Findings of Fact Nos. V and VI, Conclusion of Law No. II.)

II.

The District Court erred in finding that the intervening railroad appellants, in increasing their

ates, damaged the appellees. (Finding of Fact No. VII.)

III.

The District Court erred in concluding—

“That the action of the defendant carriers in publishing tariffs on shortened notice, not authorized by Ex Parte 162 referred to in the Findings herein, was illegal and void. That accordingly the defendant carriers were not entitled either to exact the 20% increase or the 6 cent maximum permitted under Ex Parte 162. That the rates which were in effect immediately before the initiation of the proceedings by the defendant railroads for the purpose of obtaining an increase in the rates were the legal rates applicable to these shipments here in question at the time they were made, and that all rates applied to plaintiffs’ shipments and all sums of money exacted from plaintiffs by applying such freight rates to the extent of the excess of such rates over said prior existing approved rates are and were illegal and void and without legal right, since said rates were not authorized by law nor promulgated in the manner provided by law nor in the manner specifically and expressly conditioned by the Interstate Commerce Commission.” (Conclusion of Law No. II.)

IV.

The District Court erred in concluding—

“That the Interstate Commerce Commission violated its own rules and as a result thereof denied the plaintiffs due process by granting a second peti-

tion of the railroads for reconsideration as more particularly set forth in its Order of June 21, 1954.” (Conclusion of Law No. IV.)

V.

The District Court erred in concluding—

“That the plaintiffs are entitled to judgment against the defendants, and each of them directing that the orders heretofore made by the Interstate Commerce Commission be reversed, and that these causes above-captioned be remanded to the Interstate Commerce Commission for the fixing of the amount of reparations due the plaintiffs, together with interest thereon, and the entry of a reparations order consistent with the findings of fact, conclusions of law and judgment herein entered.” (Conclusion of Law No. V.)

VI.

The District Court erred in failing to sustain the Interstate Commerce Commission’s conclusion that the appellees failed to establish any violation by the intervening railroad appellants of the Interstate Commerce Act or orders of the Interstate Commerce Commission for which they were entitled to damages.

VII.

The District Court erred in entering judgment reversing the order of the Interstate Commerce Commission dismissing appellee’s complaint before the Interstate Commerce Commission and remanding the proceedings to the Commission.

Designation

The intervening railroad appellants designate for printing by the Clerk of this Court the following portions of the record filed with this Court:

1. Complaints.
2. Petitions of intervening railroad appellants to intervene.
3. Orders granting leave to intervening railroad appellants to intervene.
4. Answers of intervening railroad appellants.
5. Stipulation for consolidation.
6. Order consolidating actions.
7. Those portions of the record before the Interstate Commerce Commission in Docket 29974 as certified by said Commission to the District Court, as follows:
 - (a) Transcript of the stenographer's notes of the administrative hearing held at Seattle, Washington on November 10, 1948;
 - (b) Exhibits Nos. 1 to 10, both inclusive, and Nos. 12 to 23, both inclusive, received in evidence at the administrative hearing held at Seattle, Washington, on November 10, 1948;
 - (c) Report proposed by George J. Hall and L. H. Dishman, Examiners, filed July 12, 1949;
 - (d) Commission report and order dated April 17, 1950;
 - (e) Commission order dated January 7, 1952;
 - (f) Commission order dated December 30, 1953;
 - (g) Petition for leave to file petition to reopen and reconsider received March 8, 1954;
 - (h) Petition to reopen for reconsideration filed June 21, 1954;

- (i) Commission order dated June 21, 1954;
- (j) Report and order of the Commission on reconsideration filed October 4, 1954;
- (k) Petition for reconsideration filed November 5, 1954;
- (l) Commission order dated January 3, 1955.

8. Stenographer's notes of the proceedings had before the District Court, including the transcript of testimony, oral opinion of the Court, statements of Court and counsel on settling of findings of fact, conclusions of law and judgment.

9. Findings of Fact and Conclusions of Law, dated June 19, 1956.

10. Judgment, dated June 19, 1956.

11. Notice of appeal by the intervening railroad appellants.

12. Statement of points on which intervening railroad appellants intend to rely on appeal, and designation of portions of the record to be printed.

Dated at Seattle, Washington, this 2nd day of October, 1956.

/s/ HAROLD G. BOGGS,

/s/ ROBERT F. GARING,

/s/ R. PAUL TJOSSEM,

Attorneys for Intervening Rail-
road Appellants

Acknowledgment of Service attached.

[Endorsed]: Filed October 8, 1956. Paul P. O'Brien, Clerk.

[Title of Court of Appeals and Cause No. 15277.]

DESIGNATION BY APPELLEES OF ADDITIONAL PORTIONS OF RECORD TO BE PRINTED

The Appellees designate for printing the following portions of the record filed in the above captioned court:

1. Those portions of the record before the Interstate Commerce Commission in Docket No. 29974 as certified by the said Commission to the District Court (said record being Exhibit II in the said District Court), as follows:

A. Petition of Defendants for Reconsideration by the Entire Commission and for Argument, filed June 22, 1950.

B. Order of the Commission, entered July 30, 1954, denying Complainants' Request for Oral Argument.

2. Those portions of District Court Exhibit IV, as follows:

A. Those portions of Supplement No. 10 to Transcontinental Freight Bureau Tariff No. 2-P, L. E. Kipp, Agent, I.C.C. No. 1527; said Supplement No. 10 having been filed December 24, 1946, as follows:

(1) All of Page 1 (the title page.)

(2) Introductory paragraph and all of the headings and third item under the headings on Page 2.

B. Those portions of Tariff of Increased Rates and Charges No. X-162, L. E. Kipp, Agent, I.C.C. No. A-3657, said schedule having been filed December 20, 1946, as follows:

(1) All of page 1 (the title page).

(2) The headings (three lines), column headings, and item 107 on Page 24.

(3) The headings (five lines) and the entire first, second and third columns (both A and B) on Page 31.

3. This Designation by Appellees of Additional Portions of Record to Be Printed.

Dated at Seattle, Washington, this 4th day of October, 1956.

/s/ ROBERT O. BERESFORD,

/s/ JO ANN R. LOCKE,

Attorneys for Appellees

Acknowledgment of Service Attached.

[Endorsed]: Filed Oct. 8, 1956. Paul P. O'Brien, Clerk.